Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

GARRY V. GIDDENS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a jury, which had heard a FELA plaintiff's evidence that he had earnings loss damages of over $1,000,000, should have been prevented from hearing the railroad's evidence that (a) the plaintiff was already receiving disability benefits of over $18,000 annually, 76.6% of which had been funded by the railroad, and (b) the plaintiff was demotivated to mitigate his earnings loss by finding gainful employment because such earnings would decrease his disability benefits.

Alternatively, if the jury was properly precluded by law from hearing relevant evidence of the true extent of the plaintiff's net earnings loss, whether the railroad should have been granted an offset against the jury's $1,520,000 verdict in the amount of the present value of such benefits, so that the plaintiff not receive a windfall double recovery.

2. Whether a state court may promulgate a jury instruction and verdict form for FELA pure comparative negligence cases against a railroad materially different from the jury instruction and verdict form promulgated for pure comparative negligence actions against all other citizens of the state.

Correspondingly, whether a state court's FELA verdict form, materially different from the verdict form promulgated for all other pure comparative negligence cases, which precludes meaningful review of whether a verdict in an FELA case is against the weight of the evidence denies due process and equal protection of the laws to railroads.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to this proceeding are the petitioner-defendant, The Kansas City Southern Railway Company and the respondent-plaintiff, Garry Vance Giddens.

The Kansas City Southern Railway Company is a wholly-owned subsidiary of Kansas City Southern Lines, Inc., which is a wholly-owned subsidiary of Kansas City Southern Industries, Inc., which is publicly held.

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PETITION FOR WRIT OF CERTIORARI

The Kansas City Southern Railway Company hereby petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Missouri.

OPINION BELOW

The opinion of the Supreme Court of Missouri is reported at 29 S.W.3d 813 (Appendix to Petition for Certiorari) ("App.") (1a-24a). The Memorandum Order of the Supreme Court of Missouri denying rehearing is noted in the Opinion and attached (App. 34a).

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on October 17, 2000. The Motion for Rehearing was denied on November 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C §1257(a).

CONSTITUTIONAL PROVISIONS & STATUTE INVOLVED

This action was commenced under and is governed by the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq*. Section 51 reads in pertinent part: [1]

> Every common carrier by railroad while engaged in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . .

Constitutional provisions involved are:

U.S. CONST. art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process

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[1] The full text of 45 U.S.C. §51 is set forth at App. 43a.

of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, The Kansas City Southern Railway Company ("KCS"), prays review of an opinion affirming a $1,520,000.00 jury verdict and judgment in favor of respondent, Garry Giddens, an employee of petitioner. Giddens was a foreman in the track maintenance-of-way department who sustained permanent injury to his left hand when a cable suspended from a crane broke causing the suspended load, a section of ties with track attached, to drop a few inches and pin Giddens' left hand between the track-tie assembly and a tie on which he had rested his hand.

1. Legal precedent and case facts material to exclusion of respondent's receipt of Railroad Retirement Act ("RRA") benefits.

A. Legal Precedent

In 1963 this Court handed down its opinion in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963) (App. 39a). *Eichel* has been construed to preclude evidence in a FELA case that the plaintiff is receiving RRA benefits and has been the source of misconstruction, vexation, confusion and millions of dollars of double recovery benefits against railroads.

This important federal question regarding the admissibility or exclusion of RRA disability benefits in the trial of a FELA case first arose in the pre-trial motion in limine filed by Giddens, in which he sought an order excluding from evidence "any mention whatsoever . . . of any and all references concerning . . . receipt or entitlement to receive benefits under the Disability Act of the Railroad Retirement Administration . . . ." KCS agreed that due to the constraint of the *Eichel* opinion as interpreted by subsequent opinions, petitioner would not make mention nor attempt to offer evidence unless respondent "opened the door" to the receipt of such evidence.

B. The law qualifying a railroad employee to apply for RRA benefits

Under 45 U.S.C. § 231a(a)(1)(iv), Giddens, in order to qualify for an occupational disability annuity under the RRA had to establish to the Railroad Retirement Board's satisfaction both that he was disabled from work in his regular occupation and that he had completed 20 years of service with the railroad.

C. Facts as to how Giddens accrued his 20 years of service

At the time of his injury in May, 1989, Giddens had accrued 16 years of service, 4 years short of that required by § 231a(a)(1)(iv). He convalesced from his injury for 13 months until June, 1990, during which time KCS continued to pay his wages under a wage continuation program and contributed to Tier II of the Railroad Retirement System, out of which occupational disability benefits are paid. He then returned to work at his same job as a maintenance-of-way foreman in June, 1990 and worked through December, 1990, at which time he laid off for additional treatment, again receiving wage continuation with employer contributions to Railroad Retirement. He returned

again to his regular job in May, 1991 and worked through December, 1991. He worked no further for the railroad thereafter. However, KCS continued his wage continuation benefits and Railroad Retirement contributions through October 1992.

By October, 1992, Giddens had also accrued vacation time and personal leave days which he was able to allocate to separate future months, and when those benefits were paid to him, contributions were made to Railroad Retirement, thus allowing him to attain the requisite 240 months of accredited service. In October 1992, realizing that he had accrued sufficient vacation and personal leave days which he could take day-at-a-time in separate months to obtain the additional required months of accredited service, Giddens advised that he was no longer physically able to do the job which he had done in the past for the railroad. He filed suit against the respondent in November 1992. Thereafter he applied for and was awarded RRA benefits.

D. Evidence received and excluded on Giddens' earnings loss damages

The jury heard evidence from two physicians that Giddens had work restrictions with respect to his injured hand, with resultant 18% body as a whole disability. It also heard from the plaintiff's vocational expert that Giddens was "well-motivated" to return to work. Finally, the jury heard from the plaintiff's economist that Giddens, age 44 at time of trial in 1998, had sustained a $204,600 past wage loss and would sustain a future wage loss projected as high as $812,000. The jury was precluded by the court's rulings from hearing that Giddens was receiving over $18,000 per year in RRA benefits, that the fund out of which these benefits were paid was funded 76.6% by KCS and that Giddens would have a dollar-for-dollar reduction of his RRA benefits for each dollar earnings which he had in excess of $400 per month.

2. Legal precedent and procedural facts material to consideration of whether the State of Missouri's requiring different forms of verdicts in pure comparative negligence cases (a) against railroads and (b) against any other citizen defendant frustrates railroads' rights to meaningful review of jury verdicts and constitutes denial of equal protection of the law.

A. The different forms of instructions and verdicts

The Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, is a system of "pure" comparative negligence or fault, i.e. contributory negligence of the plaintiff diminishes, but does not bar, recovery and the plaintiff is entitled to recover that amount of his total damages which corresponds to the employer's percentage of negligence. 45 U.S.C. § 53.

In *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983), the Supreme Court of Missouri abolished contributory negligence as an absolute defense in Missouri and adopted pure comparative negligence under the Uniform Comparative Fault Act.

Notwithstanding the substantive parallel of the FELA to the Missouri system of comparative fault for non-FELA cases, the Supreme Court of Missouri has approved different forms of instructions for the two different causes of actions. To compare:

	FELA Cases	Other Comparative Fault Cases
Measure of damages instruction	MAI 8.02 (App. 35a)	MAI 37.03 (App. 37a)
Form of verdict	MAI 36.01 (App. 36a)	MAI 37.07 (App. 38a)

An important issue of federal law and, more fundamentally, constitutional guarantees of due process and equal protection are raised by the disparate jury instruction

treatment which Missouri courts accord railroad and non-railroad litigants.

The issue of how the jury was instructed first arose during the instruction conference after the evidence but before instruction, argument and submission. Petitioner urged the giving of MAI 37.03 for *measure of damages* (App. 37a), which the court refused but gave instead MAI 8.02 (App. 35a) the measure of damage instruction specifically crafted for FELA cases. Similarly, petitioner's proffered form of verdict under MAI 37.07 (App. 38a), the one used for all non-FELA cases, was refused in favor of MAI 36.01 (App. 36a), again an instruction used in Missouri only in application to railroads as a special "class." When the court made these decisions, petitioner excepted and raised the constitutional objection.[2]

Comparison of App. 36a to App. 38a reveals the distinction between the two instructional schemes. The scheme for railroads does not require the jury to state separately its findings as to percentages of fault and total damages. The scheme applicable to all other citizen defendants in the State of Missouri does require separate itemization of percentages of fault and damages.

B. Facts material to consideration of the issue of Giddens' fault

Giddens was the foreman in charge of the work site. There was no higher supervisor present before or at the time of the accident. It was his responsibility to determine the methods of work and to instruct other employees what to do and where to do it. He was giving hand signals to the crane operator

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[2] "Defendant objects to the form. We will concede that this adheres to proper MAI format. We object because we believe MAI unconstitutionally discriminates against railroads by instructing in FELA cases differently than in other similar comparative fault cases." (App. 28a).

who was lifting the load which fell on his hand. He placed his hand on the tie beneath the suspended load notwithstanding a specific railroad safety rule.[3]

REASONS FOR GRANTING THE PETITION

I. The writ should be allowed in order to resolve a split among the circuits and state supreme courts and to allow for the first time ever before this Court full briefing, argument and consideration of (a) whether RRA benefits are from a "collateral source", and (b) whether there should be a *per se* rule excluding the receipt of such evidence or whether such ruling should be left to trial court discretion as are other evidentiary matters under Rule 403, Federal Rules of Evidence and state court rules of evidence.

A. RRA benefits are not collateral source

Notwithstanding a plethora of state and federal court decisions citing *Eichel*, the fact is that this federal question of admissibility into evidence of RRA benefits, which is a matter of vast economic impact to this petitioner and the railroad industry and ultimately society as a whole, was never fully briefed, argued and considered in the *Eichel* decision, an opinion which was rendered in a far different time and context.

Eichel accepted the lack of dispute between the parties to that case that RRA disability benefits were a "collateral source" and then proceeded, via *dicta*, to say that RRA benefits are indeed a "collateral source." The *Eichel* court then considered only the railroad's argument that under the

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[3] KCS Safety Rule 724 states:

> When rail is raised, or tie is being nipped up for spiking or tamping, avoid placing hands or feet in a position where injury might occur. . . .

facts of that case, the evidence of disability payments should be admissible as bearing on the issue of malingering. The *Eichel* opinion, which was a review of a trial court's exercise of discretion excluding RRA benefits under the facts of that case, held that the evidence of the benefits was properly excluded under the facts of that case.

Eichel merely affirmed a District Court's exercise of discretion in excluding RRA disability benefits under the facts of that FELA case. The Federal District Judge excluded the railroad's offer of evidence that the plaintiff was receiving $190 per month in RRA disability pension payments. The jury returned a verdict of $51,000.00.

The Court of Appeals for the Second Circuit reversed, 319 F.2d 12, holding that it was prejudicial error to exclude the RRA evidence. This Court then reversed the Court of Appeals, effectively reinstituting the judgment and discretionary rulings of the trial judge.

Eichel is now cited as black letter law that RRA benefits are of a collateral source. *Eichel* is no such thing. The pertinent language is:

> Respondent (the railroad) does not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner.
>
> Thus it has been recognized that:
>
> > The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers. * * * The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer. 375 U.S. 253, 254 (emphasis and parenthetical material added).

The opinion continues:

> Respondent argues that the evidence of the disability payments although concededly inadmissible to offset or mitigate damages, is admissible as bearing on the extent and duration of the disability suffered by petitioner. *Id.* at 254 (emphasis added).

Thus, on the threshold issue of whether RRA disability benefits are from a collateral source, that issue was not disputed, but was instead conceded, by New York Central. The collateral source "issue" was not briefed and argued in *Eichel* because it was not an issue due to the railroad's concession. However, this petitioner does dispute and does not concede that RRA disability pension payments are from a collateral source. RRA benefits are paid from Tier II of the RRA, 76.6% of which is "directly attributable to the contributions of the employer." RRA benefits are not collateral source.[4]

The "collateral source rule," the wisdom of which is now significantly under challenge on many fronts, traces back to *Propeller Monticello v. Mollison*, 15 U.S. (17 How.) 152, 15 L.Ed. 68 (1854) in which this Court first ruled that a defendant could not mitigate its exposure by the fact that a plaintiff had received satisfaction of damages from its own insurer. This opinion evolved into what is now known as the "collateral source rule," which has now been defined:

> [I]f an injured person receives compensation for his injuries from a source *wholly independent of the tort-feasor*, the payment should not be deducted from the

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[4] The Tier II fund is established by contributions from the employer and the employee. An amount equal to 21% of the employee's earnings, to a designated maximum, are contributed. The employer contributes 16.1% and the employee 4.9%. The employer's 16.1% is therefore 76.6% of the total 21% of earnings contribution.

> damages which he otherwise would collect from the tort-feasor.

Black's Law Dictionary 262 (6th Ed. 1990) (emphasis added).

RRA benefits are not "wholly independent of the tort-feasor." To the contrary, they are 76.6% dependent on the tort-feasor. RRA benefits are therefore not within the classic definition of collateral source.

RRA benefits also do not fall within the spirit and purpose underlying the collateral source rule. In 1854, when this Court first recognized the rule, it was considered that notwithstanding that the rule could provide a windfall to plaintiffs, public policy nonetheless supported the rule in order not to discourage the purchase of insurance by individuals who would lose the benefit of their premium dollars should the insurance benefit be offset against damages. This policy is not present in the Railroad Retirement Act.

Under the Railroad Retirement Act, there is no policy objective of encouraging the purchase of insurance. Contributions to the RRA are not a matter of individual choice. They are not optional. They are mandated by federal law. Thus, the public policy reason underlying the collateral source rule is not present with respect to RRA benefits as it may be with respect to insurance policies purchased as a matter of individual choice. Applying the collateral source rule to RRA benefits provides double recovery windfalls to plaintiffs, without protecting any legitimate interests of those plaintiffs or furthering society's public policy interests.

Notwithstanding that the collateral source rule was adopted at a time of far different economic circumstances and that it is today the subject of increasing scrutiny and legislative

abrogation [5], the important fact here is that the collateral source language in *Eichel* was attributable to stipulation and concession by the railroad in that case. The language is *dicta*. However, *Eichel* is now cited time and time again every week in FELA trials in the courtrooms of America as establishing black letter law that RRA benefits are of a collateral source.

B. Whether RRA benefits should be admissible in evidence in a FELA trial for purposes other than as an offset to damages should be expressly left to trial court discretion and not be a matter of per se rule exclusion

The *Eichel* court, having inferred by *dicta* that RRA benefits were from a collateral source and should therefore not be considered in mitigation of damages attributable to the employer, proceeded to consider the trial judge's discretionary exclusion of the benefits from evidence as "a motive for (petitioner's) not continuing work, and for his deciding not to continue going back to work after the last accident." *Id.* at 254. The Court of Appeals had concluded that the disputed evidence should have been admitted because its probative value outweighed the risk of prejudice. The Court of Appeals had therefore reversed the trial court's

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[5] Goldsmith, *A Summary of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J.AirL.&Com. 799 (Spring, 1988); McDowell, *The Collateral Source Rule-The American Medical Association and Tort Reform*, 24 Washburn L.J. 205 (1985); O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, With Compensatory Savings by Also Abolishing the Collateral Source Rule*, Law Forum, Vol. 1979, No. 3; *Unreason in the Law of Damages: The Collateral Source Rule*, 77 Harv.L.Rev. 741 (1963-64); Cf. S. Sugarman, Doing Away With Personal Injury Law, 79 and 174-76 (1989) (collateral source rule should be applied where the funds are derived from private savings and other forms of family income and wealth, but should not be applied where the losses are covered by social security, worker's compensation, employment related health care plans, private pension plans and group disability insurance).

exercise of discretion. The Supreme Court disapproved of the Court of Appeals' substituting its discretion for that of the trial court.

Under FELA, an injured employee clearly has a duty to mitigate damages. *Trejo v. Denver & Rio Grande Western Railroad Co.*, 568 F.2d 181 (10th Cir. 1977); *Jones v. Consolidated Rail Corp.*, 800 F.2d 590 (6th Cir. 1986). However, under the RRA, an Act which was adopted at a different time than the FELA and for different purposes and which is not in any sense fault-based, a plaintiff like Giddens sustains a dollar-for-dollar decrease in RRA benefits for each dollar in excess of $400 per month earned in mitigation of damages. Thus, the FELA law requiring mitigation of damages is at cross-purposes with the RRA earnings limitation law. The RRA creates a disincentive to a FELA plaintiff to mitigate his damages by finding gainful employment.

When the jury is left ignorant of this fact and law and is unaware that a person like Giddens is already receiving over $18,000 annually in benefits primarily funded by the same railroad against which he is asking the jury to return a multi-million dollar verdict, the only natural juror assumption is that surely Giddens cannot work, because, if he could, he would not leave a job paying him $35,000 a year. However, what the jury did not know is that Giddens, while not working, was receiving in RRA benefits of over $18,000 (over half of what he earned while he was working for the railroad) and that he cannot earn over $400 per month without having those benefits decrease. Therefore, the jury's assumption that if Giddens could work, he would work, which is the only reasonable conclusion which the jury can reach from the evidence (or exclusion thereof), is not valid in fact.

The 1963 *Eichel* decision was prior to the 1972 adoption of the Federal Rules of Evidence, Rule 403 of which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Here, the exclusion of the evidence is what results in unfair prejudice, confusion of the issues, and frequently almost outright perjury in the courtrooms of America in FELA trials. In 1963, when *Eichel* was decided, there was not the proliferation of "experts" who compound the nature and extent of an injured plaintiff's damages to astronomical levels which exists today. This case is a good example.

At this trial, the evidence on damages started with the plaintiff's treating physician, followed by another physician who performed a functional capacity examination. The upshot of these two physicians' opinions was that Giddens had 18% body as a whole disability for his injury to his left, non-dominant hand. The plaintiff then produced a vocational "expert" who testified that Giddens' vocational prospects were bleak indeed, notwithstanding the fact, as the expert repeated on three occasions, that Giddens was a man who was "well-motivated" to return to work.[6] The economist then followed.

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[6] This vocational expert was Dr. Bernstein whose testimony the trial court has found opened the door to receipt of RRA evidence after a prior trial. Although not relevant to the issues here presented, this case has been tried to three juries. None heard evidence of RRA benefits. The first jury returned a verdict of $400,000. The trial court granted a new trial based upon its failure to give a mitigation of damages instruction, and no appeal was taken. In the second trial, the jury returned a verdict of $1,400,000. The trial court again granted a new trial, this time because of an improper inflammatory closing argument by plaintiff's counsel and also because the Bernstein testimony about how "well-motivated" Mr. Giddens was to find gainful employment opened the door to evidence of

It is this type of mischief to which we refer when we say the exclusion of RRA benefit evidence leads to "almost outright perjury." Giddens, by virtue of his receipt of RRA benefits and threat of loss of some of those benefits if he did return to work, was "de-motivated" to return to work. Giddens knew it. The expert knew it. The trial judge and counsel knew it. The appellate courts knew it. The only persons who did not know it were the persons who most needed to know, the persons deciding what damages Giddens should receive, the jury.

It cannot be said that receipt of such evidence, which is clearly relevant and probative, is outweighed, let alone "substantially" outweighed, by the danger of unfair prejudice and confusion of the issues or misleading to the jury. To the contrary, the evil of the jury's being ignorant of the facts "substantially outweighs" any chance that the jury might "misuse" the facts. The jury should receive such evidence. It is not collateral source. It would not result in confusion or be misleading. It would contribute to, not endanger, fairness.

C. There is conflict among the Circuits and state courts of highest resort as to the important federal question presented by Eichel

Trial courts and courts of appeals with alarming regularity misconstrue and inconsistently apply the holding in *Eichel* and misapply it to cases under the FELA. A clear conflict between the circuits exist. For example, the First Circuit, in *McGrath v. Consolidated Rail Corporation*, 136 F.3d 838 (1st Cir. 1998), partially adopted the approach which we urge,

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the RRA benefits and the fact that Giddens was de-motivated under the RRA due to its earnings limitation. Although the new trial was affirmed on the basis of the improper closing argument, the Missouri Court of Appeals held that Giddens had not opened the door to the receipt of the RRA benefits and the RRA's earnings limitations. *Giddens v. Kansas City Southern Ry. Co.*, 937 S.W.2d 300, 303 (Mo. App. 1996).

i.e. in affirming a defense verdict and the District Court's exercise of discretion in allowing the receipt of RRA benefits under Rule 403, the court affirmed allowance of the evidence to show McGrath's lack of motivation to return to work. The court properly divined the true scope of the *Eichel* decision on this issue.[7] *McGrath* is thus in conflict with the opinion on which certiorari is sought here. However, even the *McGrath* court, like almost every other court in America, also falls into the easy trap created by *Eichel* of reciting that the RRA benefits are from a collateral source.

In stark contrast to *McGrath*, however, is *Green v. Denver & Rio Grande Western Railroad*, 59 F.3d 1029 (10th Cir. 1995), where the Tenth Circuit clearly construes *Eichel* as establishing a bright-line rule excluding disability benefits as both collateral source and to establish malingering.[8]

The Ninth Circuit in *Sheey v. Southern Pacific Transportation Co.*, 631 F.2d 649 (9th Cir. 1980), lines up with the Tenth Circuit in *Green* in apparently concluding that *Eichel* establishes a *per se*, black letter, bright-line rule against admissibility of RRA benefits. It concludes that "a

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[7] "However we do not believe that the *Eichel* court established a bright-line rule barring the admission of collateral source evidence on the issue of malingering. The Supreme Court simply determined that the District Court abused its discretion because the prejudicial impact of the evidence outweighed its probative value. Here, we come to the opposite conclusion." 136 F.3d 838, 841.

[8] "If there is confusion in our cases it is unimportant, because we believe Supreme Court precedent controls this issue. As plaintiff asserts, *Eichel v. New York Central RR*, . . . compels the conclusion that the collateral source rule prohibits admission of RRA disability benefits in a FELA case. The narrow issue in *Eichel* was whether evidence of RRA disability payments was admissible to show malingering by the plaintiff. The Supreme Court stated that 'The likelihood of misuse by the jury clearly outweighs the value of this evidence' and noted that it had 'recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury.'" *Id.* at 1032.

District Court's Rule 403 discretion is greatly limited in FELA cases" under *Eichel* because the Supreme Court there balanced the probative value of such evidence against any unfair prejudice and determined that in such cases, "the value is greatly outweighed by possible prejudice." Id. at 652. The rub is, of course, again, that *Eichel* merely upheld trial court discretion under the facts of the *Eichel* case. *Eichel* did not establish a reasoned rule that the evidence is *per se* excluded in all cases.

D. Giddens manipulated the system to accrue his 20 years of service for RRA eligibility

As is stated in Point C. of the Statement of the Case, Giddens had 16 years of credited service at the time of his accident. Following the accident, he convalesced for a total of 28 months in three stints interrupted by his return to his same job and work for 15 months in two separate stints. During the periods of convalescence, KCS paid him wage continuation and made contributions on his behalf to Tier II. At the time Giddens stated he no longer could do the job, he also knew that he had sufficient accrued vacation pay and sick leave days that he could allocate those days to future months of service and thus obtain the necessary 240 months to qualify for his RRA disability pension. His "inability to work" coinciding with his accruing eligibility for the pension is not pure coincidence. It was design. Giddens is not the only rail worker to conclude that it is more difficult to work after he has accrued his RRA disability eligibility than it was before accruing such eligibility. Once rail workers have their RRA eligibility "in the bank," and receive legal advice that they can sue their employer under the FELA without a jury's hearing about such benefits, the incentive to retire and sue is strong.

E. As an alternative to admission of RRA evidence at trial before the jury, at the very least, KCS, and all railroads, should be allowed an offset against a plaintiff s damages determined by the jury in the amount of the present value of the RRA benefits so that the plaintiff not receive a windfall double recovery

The jury heard that Giddens had sustained a potential total wage loss of over $1,000,000. It did not hear that Giddens was receiving over $18,000 per year in RRA benefits from a fund principally contributed to by KCS. That the jury's verdict of $1,520,000 provided Giddens with a windfall double-recovery is patent and unarguable.

Although evidence of RRA benefits should be heard by the jury on other relevant issues such as an FELA's plaintiff's disincentive and de-motivation to find gainful employment and thereby mitigate his damages, if it is concluded that such evidence should not be heard by the jury, at the very least, a railroad should be entitled to a credit in the amount of 76.6% of past RRA benefits received and 76.6% of the present value of future benefits. In this case, applying the same projections and discount values utilized by the plaintiff's expert economist, KCS should be entitled to an offset against this double-recovery of $223,667.

An offset for such a benefit was allowed by the Tenth Circuit when the employer was a non-railroad employer in the case of *EEOC v. Wyoming Retirement Systems*, 771 F.2d 1425, 1431-32 (10th Cir. 1985). However, curiously and inexplicably, the same Tenth Circuit did not provide that such an offset should be allowed to a railroad in *Green v. Denver & Rio Grande Western Railroad Company*, 59 F.3d 1029 (10th Cir. 1995).

F. Conclusion

The two page opinion of this Court in *Eichel* celebrates its 38th birthday this year. Much has changed in the intervening

38 years. The cost to this railroad, not only in this case, but in literally hundreds of other FELA cases where employees are receiving RRA benefits and to the railroad industry and, ultimately, to society as a whole, is steep, multi-million dollars annually. This unwarranted judicially-sanctioned double-recovery windfall has lived too long a life.

The time has come for a full exposition of these issues, which never took place in the oft-misconstrued and mis-cited *Eichel* opinion.

II. The Missouri courts' requirement that FELA litigants utilize a form of verdict materially different from the form of verdict utilized in all other similar comparative negligence actions violates the supremacy, equal protection and due process clauses of the United States Constitution and conflicts with the decisions of this Court.

A. States may not discriminate against FELA actions

This Court has succinctly and simply summarized the obligation of state courts entertaining FELA cases:

> Nor may a State discriminate disadvantageously against actions for negligence under the [Federal Employers' Liability Act] as compared with local causes of action in negligence. . . . [A state satisfies its duty not to discriminate disadvantageously against FELA actions only when] *all negligence suits in a State are treated in the same way, by the same mode of* disposing equitable, non-jury, and *common law jury issues* . . . .

Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 365, 367-68 (1952) (*Frankfurter, J., concurring, in part, and dissenting, in part*) (*citing Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 4 (1950); *McKnett v. St. Louis & San Francisco R.R. Co.*, 292 U.S. 230, 234 (1934) (emphasis

added). The Missouri Approved Instructions ("MAI") for FELA cases violates this most basic and fundamental constitutional precept.

This case was submitted to the jury under FELA theories of comparative fault. At trial, petitioner proffered, and the trial court refused, instructions that adhered to the format required by MAI for instructing a jury in a "typical" comparative fault negligence case, *i.e.*, a case involving every Missouri defendant other than an FELA railroad-defendant. Instead, the trial court gave, over petitioner's constitutional objection, the MAI instructions for FELA, which differ fundamentally from the typical Missouri comparative fault jury instructions.

The divergence between the two schemes is easily summarized. The MAI comparative fault instructions for all "non-FELA" cases charge the jury to make two critical determinations—(1) the parties' respective percentages of *fault* and (2) the plaintiff's *total* damages, if any fault is assessed against the defendant. Both of these jury findings of fact must be explicitly recorded on the verdict form. MAI 37.07.[9] Thus, in Missouri "non-FELA" comparative fault cases, the jury considers the evidence and makes and records its findings of fact and the trial court thereafter performs the legal and ministerial act of making the computation of reducing total damages by the percentage of fault assessed to a plaintiff.

The MAI scheme for instructing in FELA cases is inexplicably and unjustiably different. Missouri juries are charged in the required FELA damages instruction:

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[9] The jury is further informed in the required damages instruction under the "non-FELA" comparative fault format:

> In determining the total amount of plaintiff's damages you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff. MAI 37.03.

> If you find plaintiff contributorily negligent as submitted in Instruction No.___, then your award must be determined by diminishing total damages in proportion to the amount of negligence attributable to plaintiff.

MAI 8.02. Correspondingly, the required verdict form for FELA cases, MAI 36.01, allows for a recording only of a "net damages" amount and does not permit the jury to record either percentages of fault or total damages.[10]

Missouri state courts have a well-established duty under the United States Constitution to treat FELA cases "the same way" they treat other similarly situated negligence actions. By refusing petitioner's tendered instructions—the form of instructions and verdicts used by Missouri courts in all other negligence actions involving comparative fault—the trial court committed a constitutional error for which the only remedy is a new trial.

During the early 1900's, in response to state court resistance to hearing FELA cases, this Court handed down a series of decisions requiring that state courts treat FELA negligence actions the same way other negligence suits arising under state law are handled. To that end, the Court struck down a variety of other state schemes which discriminated against FELA actions. *See, e.g., Mondou v. New York & New Haven R.R. Co.*, 223 U.S. 1, 57-59 (1912); *see also New York v. U. S.*, 505 U.S. 144, 148 (1992).

Under the straightforward directions of this Court, state courts are constitutionally obligated to treat FELA negligence cases the same way other negligence cases are handled with regard to "disposing [of] common law jury issues." Missouri state courts do not.

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[10] Demonstrating the inequity (inequality) of the present MAI scheme for instructing on FELA cases is the fact that the form of verdict required for FELA comparative fault cases is used in other Missouri cases *only* when there is *no* issue of comparative fault. MAI 36.01.

Here, the respondent's claims and petitioner's defenses were not treated the same as other similarly situated negligence claims being prosecuted in the state courts of Missouri. Missouri courts improperly discriminate against FELA actions by requiring use of MAI 36.01 and thereby violate the holding in *Kansas City Southern Ry. Co. v. Jones*, 241 U.S. 181 (1916), that a railroad in an FELA action "has *the Federal right to a fair opportunity to show in diminution of damages any negligence attributable to the employee.*" *Id.* at 183 (emphasis added).

B. The Missouri courts' requirement that FELA litigants utilize a form of verdict that precludes meaningful appellate review of the jury verdict violates the equal protection and due process clauses of the United States Constitution and conflicts with the decisions of this Court

1. The Missouri instructional scheme violates due process.

As a result of the disparate treatment afforded FELA action by the Missouri Approved Instructions, the total amount of plaintiff's damages and relative apportionment of fault of the respective parties are not recorded on the verdict form. Apart from being vague and confusing to lay jurors, these MAI instructions and procedure violate federal substantive law. As a result of MAI's disparate treatment of FELA cases, it is impossible for the parties or a reviewing court to determine from the final jury verdict:

a) the gross amount of damages found by the jury;

b) the jury's relative apportionment of fault between the plaintiff and the railroad; and

c) whether the procedure for FELA fault calculation, mandated by federal substantive law, was followed, or even whether a mathematical mistake was made by the jury.

These differences between the two Missouri schemes for instructing juries unconstitutionally discriminates against FELA cases and deprives petitioner of meaningful appellate review in violation of decisions of the United States Supreme Court as well as in violation of the equal protection, due process and supremacy clauses of the United States Constitution. U.S. CONST. art. VI, cl. 2; U.S. CONST. amend. V, XIV.

For example, in this case, it is impossible to determine whether the jury's "net" verdict of $1,520,000.00 could have been the result of (a) finding Giddens 0% at fault, with gross damages of $1,520,000.00, or (b) finding Giddens 90% at fault, with gross damages of $15,200,000.00. Either finding would not withstand weight of the evidence scrutiny by an informed reviewing court. 0% fault to Giddens would be absurdly against the weight of the evidence on fault, as would $15,200,000 on damages. However, here, as the Missouri Supreme Court's opinion itself shows, the courts in Missouri are not informed.[11]

Given Giddens' status as the foreman on the job and his conduct in placing his hand in a position of obvious peril, if the jury did not attribute substantial comparative negligence to him, the verdict would have been against the weight of the evidence on negligence. However, given the instructional backdrop above set out, neither the trial court, in attempting to discharge its duty to determine whether the verdict was against the weight of the evidence nor the appellate courts, in attempting to discharge their like duty, knew what percentage of fault, if any at all, the jury attributed to Giddens. Also, neither court knew what total damages the jury determined for Giddens' damages. The opinion of the Missouri Supreme Court so establishes:

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[11] Under Rule 78.02, Missouri Rules of Civil Procedure, a court may grant a new trial on the ground that a verdict is against the weight of the evidence.

> While the jury award of $1,520,000.00 based on this evidence was generous, particularly if the jury found Giddens to be contributorily at fault to a substantial degree, it was not so grossly excessive . . . that it shocks the conscience of the Court or causes this Court to believe that the jury award was based on passion and prejudice rather than on the evidence. *Giddens v. Kansas City Southern*, 29 S.W. 3d 813, 822 (emphasis added) (App. 14a).

It could be said that the language above indicates the court assumed Giddens' fault "to a substantial degree," but then concluded that the verdict was still merely "generous," not excessive. But the point is the reviewing court did not know what the jury found.

Obviously, the Missouri Supreme Court did not know "if" the jury found Giddens contributorily at fault to a "substantial degree," or, for that matter, to any degree. Thus, meaningful judicial review was effectively thwarted and petitioner was denied due process under the law. *See, e.g., Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 426-29, 114 S.Ct. 2331, 2338-40 (1994); *Pacific Mutual Ins. Co. v. Haslip*, 499 U.S. 1, 20, 111 S.Ct. 1032, 1044 (1991) (both finding that due process requires that jury damage awards be subject to meaningful appellate scrutiny). Review of jury verdicts under the FELA scheme to determine if a verdict is against the weight of the evidence is thus blind.

2. The Missouri instructional scheme violates equal protection.

The MAI Committee's reasoning in support of its discrimination against FELA is erroneous. The MAI Committee assumes in its Comments that 45 U.S.C. § 53 requires the jury and not the judge to diminish damages. MAI 8.02 [COMMITTEE COMMENT (1991 REVISION)]. The cited statute, however, includes no such requirement, but merely states:

> [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

45 U.S.C. §53.

The opinion below gave short shrift to petitioner's constitutional arguments (App. 15-17a) by stating that counsel for the defendant did an inartful job of making a record at the instruction conference and in briefing the case before the Missouri Court of Appeals [12] and that the constitutional arguments were therefore "deemed abandoned." They were not abandoned. They were merely disregarded. Treating one class of citizens, railroads, differently from all other classes of citizens for no rational reason and thereby depriving that singular class of citizens, railroads, meaningful appellate review, is not within the concept of equal protection of the law. We ask that this Court apply equal protection as it was intended to be by the framers of the Constitution.

Missouri courts pay slavish adherence to the rule which they have adopted, Rule 70.02(b), Missouri Rules of Civil Procedure, that approved instructions "shall be given to the exclusion of any other instructions on the same subject," notwithstanding that the instruction and verdict form which those same courts have approved violate constitutional guarantees. Courts should protect the constitutional guarantees of equal protection, not be the source of their denial.

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[12]The Missouri Supreme Court accepted discretionary transfer of the case on its order, Rule 83.04, Missouri Rules of Civil Procedure. However, it then entered its opinion without further briefing or argument.

3. The Missouri state instructional scheme is in conflict with instructions of the Eighth Circuit federal scheme and all other jurisdictions' schemes.

Further demonstrating the flaw of the MAI Committee's reasoning is that no other jurisdiction uses a "net damages" approach, but instead all other federal and state jurisdictions utilize the "total damages/percentages of fault" approach that the MAI Committee asserts is improper. *See, e.g.*, PATTERN JURY INSTRUCTIONS [CIVIL] FOR THE EIGHTH CIRCUIT § 7.08 (1995); PATTERN JURY INSTRUCTIONS [CIVIL] FOR THE FIFTH CIRCUIT § 5.1 (1995); *St. Louis Southwestern Ry. Co. v. Grider*, 321 Ark. 84, 900 S.W.2d 530 (1995); *O'Ryan v. CSX Transportation, Inc.*, 255 Ill. App.3d 214, 626 N.E.2d 374, 193 Ill. Dec. 341 (1993); *Missouri Pacific R.R. Co. v. Brown*, 862 S.W.2d 636 (Tex. App. [Tyler] 1993); *Topping v. CSX Transportation, Inc.*, 1 F.3d 260 (4th Cir. 1993); *Sinclair v. Long Island R.R.*, 985 F.2d 74 (2d Cir. 1993); *Janke v. Duluth & Northwestern R.R. Co.*, 489 N.W.2d 545 (Minn. App. 1992); PATTERN JURY INSTRUCTIONS [CIVIL] FOR THE ELEVENTH CIRCUIT § 6.1 (1990); *Wilson v. Burlington Northern R.R. Co.*, 804 F.2d 607 (10th Cir. 1986); *Merando v. The Atchison, Topeka and Santa Fe Ry. Co.*, 232 Kan. 404, 656 P.2d 154 (1982).

In *Roth v. Atchison, Topeka and Santa Fe Ry. Co.*, 912 S.W.2d 583, 591 (Mo. App. [W.D.] 1995), a Missouri Court of Appeals refused to address this same constitutional objection:

> At the outset, we acknowledge strict adherence to MAI forms and "Notes on Use" is required by our Supreme Court and recall its admonition that `[i]f this court is to make this system work, and preserve its integrity and very existence, we must insist that mandatory directions be followed and that the pattern instructions be used as written.

Simply because the questioned instructions are "approved" instructions, however, does not remedy or erase the constitutional taint.[13] *City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 378 (Mo. 1991) *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464, 467 (Mo. 1995). This Court previously was confronted with similar stubborn-as-a-Missouri-mule reliance on MAI and rejected such reliance when federal substantive rights were involved. *See St. Louis Southwestern Railway Co. v. Dickerson*, 470 U.S. 409, 411 (1985). As in *Dickerson*, the constitutional error committed by the trial court cannot be justified by "approved" instructions.

Both the Missouri Court of Appeals, in *Roth*, and the Missouri Supreme Court here have been asked to address the "merits" of the discriminatory and unconstitutional Missouri instructional scheme. Both have declined. Missouri courts are obviously loathe to address the "merits" of the instructional scheme which they themselves have approved because there is no "merit" to the scheme. It is indefensible.

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[13] Under the applicable state law, petitioner preserved its constitutional attack on the Missouri Approved Instructions by timely offering alternative instructions and by raising its constitutional objections orally at the instruction conference and in writing at the earliest opportunity "*consistent with good pleading and orderly procedure* [*i.e.*, the new trial motion]." *City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 378 (Mo. 1991) (*en banc*). The Missouri Supreme Court has noted:

> Before the [objected to] instructions were given to the jury, counsel objected. . . . A similar complaint was included in the motion for new trial that the instructions [were unconstitutional]. This was sufficient to inform the plaintiff and trial court of the basic flaws in the instructions and to preserve the issue on appeal.

Bennett v. Owens-Corning Fiberglas Corp., 896 S.W.2d 464, 467 (Mo. 1995) (*en banc*).

CONCLUSION

Two important federal (and constitutional) questions of impact not only to this case, but to all railroad citizens trying cases in the State of Missouri, under its unique instructional scheme, and to all railroad citizens nationwide, under the *Eichel* decision, are presented by this Petition. Full briefing and exposition of the issues in *Eichel* and its progeny are overdue. So is the indefensible State of Missouri instructional scheme. The Court should grant the petition.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF MISSOURI,
EN BANC

No. SC 82602

GARRY V. GIDDENS,

Respondent,

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Appellant.

Oct 17, 2000
Rehearing Denied Nov. 14 2000

PER CURIAM.[1]

In 1989 Garry V. Giddens was injured while working for his employer, Kansas City Southern Railway Company (KCS). The injury occurred when a chain attached to a crane broke causing a track assembly to fall on Giddens' hand. Treatment for the hand injury included eight surgeries. Despite the treatment, Giddens was unable to return to work. He then filed suit against KCS under the Federal Employer's Liability Act (FELA). In this third trial of the suit, the trial court entered a $1,520,000 judgment for Giddens.[2] KCS

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[1] This appeal was originally decided by the Court of Appeals, Western District, in an opinion by the Honorable Laura Denvir Stith. Portions of that opinion are incorporated without further attribution.

[2] At the first trial in 1994, the jury awarded Giddens $500,000. The trial court granted a new trial due to failure to give an instruction on mitigation of damages. At the second trial in April 1995, the jury awarded Giddens $1,400,000. The trial court again awarded a new trial, this time on the basis of an improper closing argument by Giddons' counsel.

appeals the judgment, asserting six claims of error. Finding that the trial court committed no prejudicial error, the judgment is affirmed.

Considered in the light most favorable to the verdict, the evidence at trial showed: In 1989, Giddens was a foreman for KCS' maintenance-of-way department, which constructs and maintains the railroad's roadbeds and right-of-way. In May 1989, heavy rains in Louisiana caused "wash-outs," i.e., areas where the ballast under the ties and the rail are washed away, leaving the rail and ties suspended without roadbed support. Wash-out repair was not within Giddens' general duties, but KCS assigned him and his crew to washout repair.

On May 18, 1989, Giddens' supervisor, Larry Dobson, instructed him to begin repair work at milepost 612 and told him that a KCS locomotive crane would be there. Giddens and his crew were told to use the chains located on the crane to lift the tracks out of the way while cross-tie supports were inserted underneath the tracks.

On May 19, Giddens and his crew began to repair the wash-out damage at milepost 612. Giddens had never before performed wash-out repair by using a crane. At the work site, a division engineer instructed Giddens to use a backhoe to move all of the old fill and mud in the surrounding area underneath the suspended track. This would build a foundation more quickly than would stacking the cross-tie support. The engineer said that, if the old mud did not completely refill the hole under the tracks, Giddens and his crew could "shim" the landfill by taking ties and building a box structure on top of the fill.

Giddens and his crew climbed up the sides of the mud-filled foundation in order to build up a mini-crib on top of the mud. As Giddens inserted a tie underneath the track, he placed his left hand on top of the tie to steady himself. While his hand was on top of the tie, the chain from the crane

holding the track assembly broke, causing the suspended track to drop and pin Giddens' left hand between the tracks and the tie at the top of the crib. After approximately three to five minutes, those at the scene were able to attach the chain back to the crane and lift the track off Giddens' left hand.

Giddens received hospital emergency treatment and was subsequently treated by a hand specialist. He suffered crush-type fractures of the middle, ring, and small fingers of his left hand. Several reconstructive surgeries were performed on his left hand to repair the damage. While Giddens was receiving the initial treatment for his hand injury, he was not permitted to return to work. He remained on KCS' payroll through its wage continuation program.

Giddens' injury was sufficiently severe that he was not released to return to work for KCS until June 1990. In December 1990, Giddens left work for vacation and additional tendon surgery. He returned to work in May 1991. In December 1991, Giddens again took a vacation and underwent additional surgery. Two months later, Giddens attempted to return to work, but a KCS physician disqualified him from work because of safety concerns regarding his ability to lift heavy objects. Subsequent surgeries followed. In the summer of 1992, Giddens attempted to return to work again, but failed a KCS field test. At this time, Giddens was notified that he would be taken off the wage continuation program as of October 1992.[3]

Giddens filed this suit in November 1992. He filed interrogatories and a request for production asking for the names of persons who had obtained written statements from Giddens, including a video or motion picture of him, and for

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[3] Although Giddens was taken off KCS' wage continuation program, he remained eligible for disability pension benefits under the Railroad Retirement Act.

copies of those statements and videotapes. No videotapes were taken at that time.

Before the third trial, KCS hired an investigator to watch Giddens. The investigator made videotapes of his surveillance in April 1997. These were sent to counsel for KCS on May 16 and June 3. The videotapes showed Giddens performing various activities, including raking leaves, sweeping and clearing natural debris, breaking tree branches and sticks, carrying tree limbs, gathering trash, and mowing the lawn with a push mower. In some parts of these videotapes, Giddens appeared to be using his injured hand to hold or push items.

On July 3, KCS conducted a supplemental deposition of Giddens. The existence of the videotapes had not been disclosed to Giddens. At the deposition, counsel for KCS again questioned Giddens concerning the physical limitations associated with his injured hand-this time specifically addressing the types of activities captured on the video surveillance. KCS asserts that Giddens' answers as to his ability to perform various activities were seriously at odds with what the videotapes showed he could do in at least ten respects. According to Giddens, his testimony and the videotapes are not inconsistent, since the questions were vague or dealt with abilities not depicted in the videotapes in various respects.

On July 8, KCS served an amended discovery response advising Giddens of the existence of the videotape surveillance. Giddens' attorneys subsequently deposed the investigator who performed the video surveillance. He explained when and how he obtained the videotapes and sent them to counsel for KCS.

Giddens then filed a motion to exclude the video surveillance tapes from evidence on the basis that KCS failed seasonably to divulge information regarding the videotapes

by keeping them secret until after Giddens' supplemental deposition. The motion also requested such other relief as the court deemed proper, including striking KCS' pleadings or imposing other sanctions.

Giddens' motion was not ruled until the day of trial January 13, 1998. The judge held that KCS had violated discovery rules by failing seasonably to supplement its interrogatory answers concerning its videotape "statements" of Giddens. The judge did not exclude the videotapes as a sanction for the discovery violation, however, because he believed the tapes might be needed so that the jury could see what activities Giddens could perform. Instead, he sanctioned KCS by prohibiting use of Giddens' post-surveillance deposition testimony, even for impeachment purposes.

At trial, Giddens testified about his physical condition and limitations. His answers were consistent with what the videotape surveillance showed about his condition. His prior trial testimony was not used to impeach him. His testimony was not fully consistent with portions of his excluded deposition testimony, which indicated a more limited physical capacity.

Giddens also provided testimony from three expert witnesses, including: (1) a railroad specialist who testified as to the alleged deficiencies in KCS' operations; (2) a psychologist-rehabilitation specialist who testified as to his injuries and his rehabilitation; and (3) an economist who testified as to his lost wages. Giddens further introduced OSHA regulations allegedly violated by KCS as evidence of KCS' negligence in operating and maintaining the work site.

The court entered judgment in accordance with the jury's verdict. All KCS post-trial motions were overruled. KCS appeals.

KCS challenges the submissibility of Giddens' case and argues that the trial court erred in failing to grant its motion for judgment notwithstanding the verdict (JNOV). The

standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict. A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. *Houghton v. Atchison, Topeka & Santa Fe Railroad Co.*, 446 S.W.2d 406, 409 (Mo. banc 1969). In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict. *Id.* This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion. *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 461 (Mo. banc 1998).

Under FELA, the employer has a duty to provide its employees with a reasonably safe place to work. If the employer's negligence plays any part, even the slightest part, in producing the employee's injury, then a submissible case is made. *Qualls v. St. Louis Southwestern Ry. Co.*, 799 S.W.2d 84, 85-86 (Mo. banc 1990). Contributory negligence by the employee will not bar recovery but may diminish the amount of recovery in proportion to the amount of employee negligence. *Wilmoth v. Chicago, Rock Island and Pacific R. Co.*, 486 S.W.2d 631, 636 (Mo.1972).

KCS asserts an exception to the usual comparative fault rule applies here because, as foreman, Giddens was in charge of the job site and assumed an independent duty to follow KCS' safety rules. Those rules precluded him from putting his hand under the railroad tracks while they were raised. However, the cases cited by KCS conflict with the adoption of a comparative fault system under which employee negligence is not used as a complete bar to recovery, but merely as a reduction to the recovery. *Id.* KCS' reliance on

Walker v. Lykes Bros. S.S. Co., 193 F.2d 772 (2nd Cir.1952), is misplaced as it is a Jones Act case rather than a FELA case.

Viewing the evidence in the light most favorable to Giddens, there was evidence that Giddens was inexperienced in both crane use and wash-out repair, that KCS failed to provide the proper equipment to perform the wash-out repair, and that the working conditions were unsafe. A jury could reasonably infer from this evidence that KCS was negligent in providing an unsafe work environment and that its lack of care played at least some part in Giddens' injury. Although KCS' evidence contradicted Giddens' testimony, and although KCS argues that its testimony was more credible and cast serious doubt on Giddens' version of events, it was up to the jury to make its own credibility determinations as well as any inferences of negligence from the evidence.

The trial court did not err in overruling KCS' JNOV motion.

KCS also challenges errors by the trial court in ruling on the admission of evidence, in imposing sanctions for discovery violations and in instructing the jury. The trial court is vested with broad discretion regarding rulings on the admission of evidence and the imposition of sanctions for discovery violations. Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Anglim v. Missouri Pac. R.R.*, 832 S.W.2d 298, 303 (Mo. banc), *cert. denied*, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992). The failure to submit an instruction to which a party is entitled is error, but such error will warrant reversal only when the merits of the action have been materially affected and when the error is properly preserved. *See Goff v. St. Luke's Hosp. of Kansas City*, 753 S.W.2d 557, 564 (Mo. bane 1988).

KCS asserts the trial court erred in concluding that KCS failed seasonably to supplement discovery and in imposing a discovery sanction by barring introduction of Giddens' videotaped deposition testimony at trial. KCS asserts that: (1) its supplementation of its interrogatory answers was seasonable in that it notified Giddens of the videotapes at least seven months prior to trial, and (2) even if its supplementation was not seasonable, barring introduction of the deposition testimony for impeachment purposes was error because it prevented the jury from knowing that Giddens had previously testified under oath inconsistently with his testimony at this trial and, thus, was not a credible witness.

Here, the trial court imposed a sanction for a discovery violation in connection with a failure to reveal timely the videotape surveillance of Giddens. Rule 56.01 allows discovery of a party's statements concerning the action, as follows:

> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. For purposes of this paragraph, a statement previously made is: (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, audio, *video, motion picture* or other recording, ~~or~~ a transcription thereof, of the party or of a statement made by the party and contemporaneously recorded.

Rule 56.01(b)(3) (emphasis added). A videotape of a party constitutes a "statement" of the party within the meaning of Rule 56.01. *State ex rel. Missouri Pacific v. Koehr,* 853 S.W.2d 925 (Mo. banc 1993). The video surveillance tapes in this case are discoverable.

As previously noted, by interrogatories propounded in 1993, Giddens asked KCS whether it had any knowledge of videotapes of Giddens taken since the time of the accident. In

its original response, KCS answered in the negative, for at that time it had no such videotapes. Under Rule 56.01(e), a party has an obligation seasonably to amend its answer to an interrogatory if an initial response becomes inaccurate due *to* later events. That rule requires:

> (e) *Supplementation of Responses.* A party who has responded to written interrogatories with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> * * * *
>
> (2) A party is under *a duty to amend a prior response seasonably* if the party obtains information upon the basis of which a party knows that the response (A) was incorrect when made or (B) though correct when made is no longer true.

Rule 56.01(e) (emphasis added).

Here, the parties agree that under *Koehr* and Rule 56.01(e) KCS had a duty seasonably to supplement its prior interrogatory answers by informing Giddens in writing of the existence of the videotapes. The parties disagree whether KCS' supplementation was "seasonable" and whether the court properly sanctioned KCS.

The construction given by the federal courts to their rules does not control the interpretation of our state rules, even if the rules themselves are nearly identical. However, the experiences of those courts in applying rules similar to our own are illustrative; *Martin v. City of Washington,* 848 S.W.2d 487, 495 (Mo. banc 1993). Federal Rule of Civil Procedure 26(e)(2) is similar to our Rule 56.01(e). Both require a "seasonable" amendment to prior responses to interrogatories. For purposes of the federal rule, supplementation need not be made as each item of information is learned but should be made at appropriate

intervals during the discovery period, with special promptness as the trial date approaches. Fed. R.Civ.P. 26(e), *Advisory Committee Note 1993*. In this case, the videotapes were disclosed within two months of the time they were made and seven months before trial. This is more than sufficient time to allow a party to prepare for trial.

Giddens contends that consideration of the time to prepare for trial is not the only criteria. He urges that he was prejudiced because the videotapes were not disclosed prior to his last deposition. Revelation of the videotapes prior to the supplemental deposition could only be prejudicial if Giddens were to lie at his supplemental deposition, and the rules are not intended to provide a means by which a plaintiff may avoid the truth or avoid being caught in a lie. If Giddens is completely truthful in his answers to questions propounded at the deposition, then no prejudice occurs. Although the time to prepare for trial is not the only factor in determining if a supplemental disclosure is seasonable, in this case Giddens fails to show any prejudice or any other factor indicating a lack of seasonable supplementation. *Koehr* does not require a different result. That case involved answers to interrogatories in the first instance not supplementation. The trial court abused its discretion in finding that the videotapes were not seasonably disclosed.

Although the trial court erred by imposing a sanction for KCS' alleged discovery violation, the sanction imposed did not prejudice KCS. The court permitted the videotapes to be shown to the jury. The jury, thus, heard and saw relevant evidence relating to the extent of Giddens' physical injuries.

KCS appears to suggest that the deposition testimony should have been admitted simply to impeach the general credibility of Giddens. It was not prevented, however, from impeaching Giddens with respect to any specific testimony by use of the videotape or with his prior testimony from the first or second trial on first or second deposition. The use of the

other materials was sufficient to ensure that the jury had the information necessary to evaluate the testimony properly. The trial court's sanction, although erroneous, did not prejudice KCS.

KCS next asserts that the trial court erred in permitting Giddens' counsel to read and display to the jury certain regulations promulgated under the Occupational Safety and Health Act, 29 U.S.C. sections 651, et seq. (OSHA). The OSHA regulations at issue concerned the type of chains used on the locomotive crane that lifted the railroad track and the OSHA requirements that such chains be tested, inspected, and labeled for their appropriate use. John Edwin Blaylock, a division engineer, and Larry Dobson, KCS' company representative, testified to KCS' compliance with OSHA regulations. Both witnesses testified that they were not familiar with the OSHA regulations. During closing argument, Giddens' counsel referred to the OSHA regulations, argued KCS' duty to know applicable OSHA regulations, and to follow them, and argued KCS' conduct failed to meet these OSHA regulations when it failed properly to test, inspect and tag the chains.

OSHA regulations offered as evidence of the standard of care owed by a party are competent evidence relevant to the question of negligence. *See Schneider v. Union Elec. Co.*, 805 S.W.2d 222, 229 (Mo.App.1991). Moreover, such rules and regulations promulgated pursuant to federal statutes may be judicially noticed and considered as evidence. *See Kawin v. Chrysler Corp.*, 636 S.W.2d 40, 44 (Mo. banc 1982). A trial court may permit pertinent rules of this type to be read into evidence and a violation of the substance of pertinent rules may be hypothesized as evidence supporting a jury finding of negligence. *Id.; Hough v. Rapidair, Inc.*, 298 S.W.2d 378, 383 (Mo. banc 1957).

KCS argues that the OSHA regulations Giddens introduced into evidence were not in effect at the time of the accident in

1989; the regulations from the 1984 volume of the Code of Federal Regulations were offered at trial. KCS does not dispute, in its reply brief, Giddens' contention that the relevant regulations remained the same from 1979 to 1993. Giddens presented sufficient evidence of the relevance and applicability of the OSHA regulations at issue to allow their admission.

Finally, while KCS argues that Giddens used the OSHA regulations as a basis for arguing negligence *per se*, the OSHA regulations were used only to support the argument that KCS breached a standard of care it owed to its employees by violating the regulations. For this purpose, the regulations were competent evidence that could be considered by the jury, along with other evidence bearing upon the question of KCS' negligence. *See, e.g., Schneider,* 805 S.W.2d at 229. Negligence *per se* was neither argued nor submitted. Therefore, it was not error for the trial court to admit evidence of the OSHA regulations and their alleged violation by KCS.

As it was not error to admit the OSHA regulations, KCS' argument that the trial court erred in failing to give the jury an instruction withdrawing from its consideration evidence of the regulations and of KCS' alleged violation of them is rejected.

KCS asserts the trial court erred in failing to find that the amount of the jury verdict was against the weight of the evidence in that: (1) the $1,520,000 award was so grossly excessive as to indicate bias, passion and prejudice on the part of the jury; (2) there was insufficient evidence to support the amount of the award; and (3) the amount of the award was so large as to show that the jury failed to follow the court's instruction that Giddens had a duty to mitigate damages.

The standard of review of a claim that the trial court erred in failing to find the verdict excessive is a narrow one: an appellant must show both that the verdict is excessive and

that some event occurred at trial that incited the bias and prejudice of the jury. The mere size of the verdict does not in and of itself establish that it was the result of bias or passion and prejudice without showing some other error was committed during the trial. *Means v. Sears, Roebuck & Co.*, 550 S.W.2d 780, 788 (Mo. banc 1977). KCS has failed to meet this standard, for it has failed to identify any trial event that could have caused the bias and prejudice it claims occurred. The errors specifically alleged have not been found to be meritorious; therefore, they cannot serve as a predicate for a finding of excessiveness of the verdict.

KCS also fails to meet the second prong of the excessiveness test by showing that the size of the verdict is so grossly excessive as to shock the conscience because it is glaringly unwarranted. In reviewing verdicts to determine if they are excessive, appellate courts overturn only those verdicts that are obviously out of line and grossly improper. To obtain relief on the basis of excessive verdict, the defendants must demonstrate that the verdict is glaringly unwarranted so as to shock the conscience of the court. *Tune v. Synergy Gas* Corp., 883 S.W.2d 10, 21 (Mo. banc 1994). The test applied by appellate courts is not fine-tuned and should not be; the appellate courts generally defer to the jury's decision as to the amount of damages. This is as it should be because the determination of the amount of damages is a task that lay juries are particularly able to perform. *Id.*

Here, as a result of the accident, Giddens sustained permanent injury to his left hand, limiting the dexterity and overall strength in his left arm. The injury was sufficiently severe that he was unable to work for one year after the injury and required repeated surgeries and consequent additional month off work while he recovered. A disability evaluation rated Giddens at a 30% disability of the left upper extremity and an 18% disability of the body as a whole. At the time of trial, Giddens was 44 years old with a high school education.

Giddens' entire work history consisted of heavy labor for the railroad. He was ultimately let go by the railroad because he was unable to continue employment in this line of work due to his injury. A rehabilitation specialist testified that Giddens' future employment opportunities would be limited to areas of light and sedentary work requiring minimal use of the left hand. The specialist offered the opinion that, even were Giddens able to find employment of this nature, it most likely would be an unskilled, minimum wage job and that, because of Giddens' injury, it was reasonable to expect he would suffer periods of unemployment. A professor of economics testified that the present value of Giddens' total lost earnings ranged from a high of $1,017,019, to a low of $541,836, depending on when Giddens would have retired and whether he would be able to find minimum wage employment.

While the jury award of $1,520,000 based on this evidence was generous, particularly if the jury found Giddens to be contributorily at fault to a substantial degree, it was not so grossly excessive, in light of the amount of his past and potential future lost wages and in light of his injuries, pain and suffering, that it shocks the conscience of the Court or causes this Court to believe that the jury award was based on passion and prejudice rather than on the evidence.

In its next point, KCS objects to the manner in which the trial court directed the jury to record its damage determinations.

In most Missouri cases the jury is asked to determine a total amount of damages and the percentage of fault of plaintiff and of defendant, and the jury is told that the judge will reduce the total damages awarded by the percentage of fault attributed to plaintiff. *See, e.g.*, MAI 37.03. FELA, however, requires the jury rather than the judge to diminish the total damages by the comparative fault of the plaintiff. 45 U.S.C. sec. 53. For this reason, the jury in FELA cases is instructed that after it determines the sum of damages to

which it believes plaintiff is entitled as a result of the defendant's conduct, "If you find plaintiff contributorily negligent as submitted in Instruction Number _____ then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff." MAI 8.02. The Committee Comment to MAI 8.02 explains this variance:

> The submission of comparative fault in an F.E.L.A. case differs from the method in Chapter 37.00 for use in cases based on Missouri law. F.E.L.A. cases are governed by federal law. Under 45 U.S.C. Sec. 53, the *jury* diminishes damages in proportion to the employee's negligence. Under Chapter 37.00, the jury determines *total damages* and plaintiffs percentage of fault but the *judge* makes the actual computation diminishing total damages to the amount recoverable by plaintiff.

MAI 8.02, Committee Comment (1996 Revision).

KCS objected to instructing the jury in accordance with MAI 8.02 on the basis that this instruction "unconstitutionally discriminates against railroads by instructing in FELA cases differently than in other similar comparative fault cases." KCS never elaborated on this objection by explaining for the trial court how or why this alleged discrimination was unconstitutional, and the trial court overruled the objection. In this Court, KCS now argues that the instruction and verdict form are unconstitutional in that they treat railroads differently from other negligent defendants and that this violates the Missouri and United States constitutions' due process, equal protection and supremacy clauses.

KCS has failed to preserve its claim that the manner of submitting FELA cases violates the Missouri constitution. It nowhere cites to provisions of the Missouri constitution that are allegedly violated (Missouri, of course, has no supremacy

clause), nor does it argue how they are violated. It limits the argument portion of its brief to a discussion of the alleged violation of federal law and the federal constitution. We accordingly do not further address its claims of violation of the Missouri Constitution. *Beatty v. State Tax Comm'n,* 912 S.W.2d 492, 498-99 (Mo. banc 1995).

KCS does allege in its argument in this Court that due process is violated because the parties and the appellate courts have no means of determining whether the jury correctly made its mathematical computations in diminishing total damages by the amount of plaintiff's negligence or whether it properly reduced total damages by plaintiff's fault in the first instance. It urges that this denies meaningful judicial review. This is not the same argument that KCS made to the trial court below. There, it argued not that the instruction was vague or ambiguous, or denied the parties meaningful appellate review, but rather that the instruction unconstitutionally discriminated between FELA and non-FELA cases. Where an alleged error on appeal relating to an instruction differs from the objections made to the trial court, the error may not be reviewed on appeal. *Seidel v. Gordon A. Gundaker Real Estate Co., Inc.,* 904 S.W.2d 357, 364 (Mo.App.1995); *see State v. Hankins,* 642 S.W.2d 606, 611 (Mo. 1982). This portion of KCS' argument also is not preserved.

The bulk of KCS' argument in this Court on the issue of submission of damages asserts that the distinction between how the jury records its damage verdict in FELA and non-FELA cases constitutes unconstitutional "discrimination" against FELA cases. It never explains in the argument portions of its brief how this alleged discrimination rises to a constitutional level, or what constitutional provisions are violated or how the violation occurs. In its point relied on, KCS suggests a violation of the equal protection clause, but it never refers to that clause in its argument nor does it cite any

cases supporting an equal protection claim. That argument is deemed abandoned.

While KCS also fails to refer to the supremacy clause directly in the argument section of its brief, it does support its discrimination argument by citing to a number of federal cases that have struck down state laws discriminating against the bringing of FELA actions. *See, e.g., New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992); *Dice v. Akron, Canton & Youngstown R.R. Co.*. 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952); *Mondou v. New York & New Haven R.R. Co.,* 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327 (1912). It notes these cases do not allow a state to "discriminate disadvantageously against actions for negligence under the Federal Act as compared with local causes of action in negligence." While most of these cases do not address the supremacy clause issue, *Mondou* and *McKnett v. St. Louis & S.F. Ry. Co.,* 292 U.S. 230, 54 S.Ct. 690-78 L.Ed. 1227 (1934), cite that clause as a basis for striking down application of state law in FELA cases regarding jurisdictional issues. *Mondou,* 223 U.S. at 57-59, 32 S.Ct. 169.

Here, however, KCS has not identified any way in which Missouri is discriminating disadvantageously against actions for negligence under FELA. It is simply objecting to how Missouri allows the jury to record its damage verdict in such cases, not to law governing the standards under which such damages may be awarded or the amount of damages that may be awarded. KCS cites no authority for the proposition that it is disadvantageous to FELA actions if jury instructions are not identical in FELA and non-FELA cases, and none is found. Moreover, none of these cases addresses the issue now raised by KCS, that it is unconstitutional to require a jury to break out its damages and comparative fault determination separately in non-FELA cases but not in FELA cases. Accordingly, KCS' constitutional arguments are rejected.

In its last point on appeal, KCS asserts the trial court erred in refusing to admit evidence of Giddens' Railroad Retirement Disability Benefits. As a general rule, evidence of a plaintiffs receipt of disability pension payments under the Railroad Retirement Act is inadmissible at trial under the "collateral source doctrine" because its probative value is outweighed by its potential prejudicial effect on the jury. *Eichel v. New York Cent R.R. Co.*, 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963). Numerous rationales have been used to justify the application of the collateral source rule. *See Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 619 (Mo. banc 1995). KCS argues, however, that the rationale behind exclusion of collateral source payments does not apply to Giddens' pension benefits, since they are funded, at least in part, by the railroads themselves. *Eichel* forecloses this argument.

Nevertheless, KCS argues that an exception to the collateral source rule has been recognized where the plaintiff injects his financial condition into a case. *Moore v. Missouri Pacific R. Co.*, 825 S.W.2d 839, 842-43 (Mo. banc 1992). KCS is precluded from raising this issue by the law of the case doctrine. The general rule is that the decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not. The court's decision remains the law of the case throughout all subsequent proceedings, both in the trial and appellate courts. *Shahan v. Shahan*, 988 S.W.2d 529, 533 (Mo. banc 1999). This doctrine applies in this case because the issue of whether the testimony of the rehabilitation specialist as to Giddens' motivation to work opened the door for introduction of evidence of Giddens' pension benefits was determined unfavorably to KCS in the first appeal of this case. *Giddens v. Kansas City Southern Ry. Co.*, 937 S.W.2d 300, 305 (Mo. App. 1996). KCS is not free to re-litigate this issue now.

The judgment of the trial court is affirmed.

LIMBAUGH and COVINGTON, JJ., concur; WOLFF, J., concurs in separate opinion filed; WHITE and BENTON, JJ., concur in opinion of WOLFF, J.

PRICE, C.J., and HOLSTEIN, J., not participating.

MICHAEL A. WOLFF, Judge, concurring.

The trial judge was correct in determining that the railroad and its attorneys violated the duty seasonably to supplement, under our Rule 56.01(e), as to the existence of surveillance videotapes of plaintiff Gidden. We should interpret the word "seasonably" to refer to the time standard for interrogatories. Applying the time standard for interrogatories to this case, the railroad had an obligation to correct its answer to the interrogatory within 30 days after it learned that it had videotapes of Giddens.

"We have come a long way since the days of the 'sporting theory of justice.' *State ex rel. State v. Riley* 992 S.W.2d 195, 197 (Mo. banc 1999). Pre-trial discovery performs important and legitimate functions. Liberal discovery aids in overall trial preparation, narrowing of issues, promotion of early settlements, and most importantly, the ascertainment of truth. Our rules should be interpreted to promote the search for truth and evenhandedly minimize game playing by lawyers on both sides of counsel table.

The supplementation rule promotes the search for truth. It eliminates the need for periodic waves of repetitive interrogatories. Prior to the 1970 version of Federal Rule 26, upon which our Rule 56.01 is based, federal decisions recognized that a court, in ordering a party to answer an interrogatory, could expressly provide that the interrogated party was under a continuing duty to supplement in light of new information. Some courts held that the discovering party itself could make the interrogatories continuing by so providing in its interrogatories, while other courts refused to allow this. *See* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L.

MARCUS, FEDERAL PRACTICE AND PROCEDURE sec. 2048 (2d ed.1994).

Rule 56.01(e) requires a party "seasonably" to supplement its interrogatory answers as to the identity of witnesses, including experts, or when the party learns that an interrogatory response was incorrect when made or is no longer true. If we were to deem these interrogatories as continuing, then the duty "seasonably" to supplement would logically incorporate the time limit in our Rule 57.01(a), which in this instance would be 30 days after the date that "the party obtains information upon the basis of which the party knows that the response (A) was incorrect when made or (B) though correct when made is no longer true." Rule 56.01(e)(2).

There is no reason the time limit for supplementing an interrogatory answer should be different from the time limit for answering an interrogatory in the first place.

The use of the word "seasonably" in the rule, rather than specific reference to time limits, recognizes the flexibility needed when a trial date is imminent, which was not the case here. The court of appeals in *State ex rel. Missouri Highway and Transportation Commission v. Pully,* 737 S.W.2d 241, 244-45 (Mo.App.1987), reads the word "seasonable" to mean "reasonable." In cases where trial is imminent, use of a 30-day time limit would be unreasonable. This interpretation would track the flexibility given in Rule 57.01(a) for the court to allow a shorter or longer time than 30 days for the answering of interrogatories. The presumption in all cases should be that the 30-day time limit for interrogatories applies to the duty to supplement. The presumption is overcome where circumstances, such as the timing of the trial setting or pretrial discovery order, warrant a shorter or longer time. No such circumstances appear in this case.

If a party with a surveillance videotape wishes to withhold that evidence from discovery until the plaintiff has been

deposed, the party—in this case the railroad— should seek a protective order under Rule 56.01(c) or an order under Rule 56.01(d) as to the sequence and timing of discovery. To fail-to disclose even the existence of such materials, which have properly been requested, does not further the search for truth and violates our discovery rules.

Federal courts sometimes permit a delay in production of a plaintiffs statements by issuing a protective order allowing the defendant to delay disclosure of statements until after the plaintiff's deposition has occurred. *See Torres-Paulett v. Tradition Mariner, Inc.*, 157 F.R.D. 487, 489 (S.D.Cal.1994); *Smith v. Central Linen Service Co.*, 39 F.R.D. 15, 18 (D.Md.1966). Where no protective order has been requested, federal courts have held that the statement must be produced. *See, e.g., Willard v. Constellation Fishing Corp.*, 136 F.R.D. 28 (D.Mass. 1991). The same protective order provisions are available under our Rule 56.01(c).

With due respect to the federal precedents, a motion for protective order does not precisely fit this situation, because the grounds for such an order are "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[1] The more appropriate motion, it seems

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[1] Rule 56.01(c) provides:

> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

to me, is a motion under Rule 56.01(d)[2] which allows the court, "in the interest of justice," to set the sequence of discovery.[3] Thus, under this provision, a court could order that the videotapes be withheld until the plaintiff's deposition has been taken. Rule 56.01(c) requires a party to show "good cause" to obtain a protective order, and Rule 56.01(d) recites "as justice requires." The federal trial court cases cited above suggest that a defendant would be entitled to a protective order by simply asserting that the defendant wants the benefit of an unrefreshed recollection of the facts. Other trial judges, however, might require a party to show, by reference to pleadings and discovery, the possibility that a plaintiff's claims may be overblown.

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(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If a motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 61.01 apply to the award of expenses incurred in relation to the motion.

(Rule 56.01(c) is similar to federal Rule 26(c).)

[2] (d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any party's discovery.

[3] Our Rule 56.01(d) is similar to federal Rule 26(d).

Requiring a party possessing statements or surveillance video to move for an order will prevent knowing concealment of discoverable materials that have been properly requested. When a party is required to seek an order to withhold disclosure of such material temporarily, the defendant may still have the benefit of getting the plaintiff's version of the facts on the record before producing a statement that might affect plaintiff's testimony. An order should also ensure that the plaintiff will have the statement in time to prepare for trial.

This interpretation would have the salutary effect of ensuring that the deponent is careful not to exaggerate, because the deponent cannot be sure what written or videotaped statement may be produced in discovery after the deposition. *See* 23 AM JUR. 2d *Deposition and Discovery* sec. 46 (1983).

In this case, when plaintiff's counsel was served with a notice that his client was to be deposed again, the railroad should have moved for an order allowing it not to disclose the videotaped surveillance until after the deposition was taken. If such a motion is not required, the option is for plaintiff's counsel to file a specific request for supplementation of the previous interrogatories, or a repetitive set of interrogatories, and then go to the court to have the time shortened for the responses so that the attorney can get answers before the client's deposition. While our Rule 56.01(e)(3) allows for such repetitive requests, we should not clutter up the discovery process by encouraging their use.

When we interpret the word "seasonably" as presumptively incorporating the time limits of the interrogatory rules, we have a more precise standard for determining when the supplementation rule is violated. In this case, the railroad was required to disclose the videotapes no later than June 15, and July 3, 1997, which were 30 days following the respective dates on which the railroad's attorney received the two

videotapes. However, the videotapes were not disclosed until July 8, 1997, after the plaintiff's deposition was concluded. Under this standard, the trial court did not abuse its discretion in imposing a sanction on the railroad for failing seasonably to supplement its answers.[4]

If we uphold the trial judge's conclusion that the railroad violated its duty "seasonably" to supplement its interrogatory answers, then the trial judge's sanction— prohibiting use of the deposition at trial— makes sense. The resolution by the trial judge furthered the trial as a search for truth. The trial judge appropriately allowed the railroad to use the surveillance videos to minimize the plaintiff's injuries. What the trial judge prohibited was the use of the alleged "gotcha" deposition; at most the deposition may have shown that Giddens had previously exaggerated his injuries or the extent of his disability. Juries of course do penalize plaintiffs, sometimes in the measure of damages, if they believe a plaintiff has exaggerated, lied, or is a malingerer. What the railroad was deprived of, in this instance, was perhaps the opportunity for some jury justice that would not have been legally relevant to the real issues in the case, i.e., whether the railroad was negligent and what were the nature and extent of the plaintiff's injuries.

I would uphold the trial judge's resolution of this issue. I concur in the result reached by the principal opinion, and in the analyses of the other issues in the principal opinion.

---

[4] The deposition was held on July 3, 1997. It is possible that the second videotape would not have been seasonably produced, under this standard. But certainly the first videotape, from May 15, 1997, would have been disclosed, or an appropriate order sought

APPENDIX B

[Filed Nov. 1, 2000]

IN THE SUPREME COURT OF MISSOURI

GARRY V. GIDDENS
Plaintiff/Respondent,

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Defendant/Appellant.

APPELLANT KANSAS CITY SOUTHERN'S MOTION FOR REHEARING

Comes now appellant. The Kansas City Southern Railway Company, pursuant to Rule 84.17, and moves that the Court grant rehearing on the Opinion of the Court filed on October 17, 2000 and, in support thereof, appellant states:

> With respect to the issue of timeliness of supplementation of discovery responses and the trial court's sanction imposed (Opinion *Per Curiam* Op. 8-12):

1. In stating: "(Giddens' trial) testimony was not fully consistent with portions of his excluded deposition testimony," *Per Curiam* p. 6. and that "The (excluded) deposition may have shown that Giddens had previously exaggerated his injuries or the extent of his disability", Concurring Opinion. p. 6, the Opinion has overlooked material matters of fact in the case, i.e. that the wrongfully excluded deposition testimony was not just a matter of not being "fully consistent" or an "exaggeration." It was lies. See Exhibit "A" hereto.

2. The *Per Curiam* Opinion's conclusion that although the trial court abused its discretion and erred in excluding

Giddens' deposition testimony, such did not result in prejudice to the defendant overlooks the material matter of fact that the plaintiff's testimony here as to the defendant's alleged negligent conduct contributing to cause his injury was largely uncorroborated and thus was subject to only the same "guarantee of trustworthiness" (i.e. Mr. Giddens' truthfulness) as Mr. Giddens' testimony as to the extent of his injuries. That the finder of fact in this case, the jury, was not allowed to hear Mr. Giddens' sworn deposition testimony, which was clearly relevant and material and admissible under Rule 57.07 and the other authorities cited, did result in substantial prejudice to the Kansas City Southern. The finder of fact was prevented from hearing and considering that a person who, at the time of giving his sworn deposition testimony, was prepared to lie to them as to the extent of his injuries would be just as inclined to lie as to the cause of his injuries. This is not a matter of the appellant's being deprived of "the opportunity for some jury justice that would not have been legally irrelevant to the real issues in the case," Concurring Opinion p. 6, it is a matter that the appellant was denied the opportunity for jury justice period.

3. Ten years ago, prior to the amendment to Rule 56.01(b)(3), making surveillance materials discoverable as a "statement" of the plaintiff, Mr. Giddens would have come into this courtroom and testified exactly as he did in his deposition, which was excluded. Defendant would then have shown the videotape clearly establishing the falsity of that testimony. Mr. Giddens, had he received any verdict whatsoever at the hands of the jury, would surely not have received $1,520,000. Again, this is not "jury justice" on an irrelevant issue, unless truth in the courtroom is irrelevant and the right to test and impeach testimony is no longer relevant in the adversarial system. This does not indicate progress in the law.

With respect to the excessiveness of the verdict and judgment *(Per Curiam* Op. 13-16):

4. In holding *(Per Curiam* Opinion p. 14): "The errors specifically alleged have not been found to be meritorious; therefore, they cannot serve as a predicate for a finding of excessiveness of the verdict," the *Per Curiam* Opinion overlooks the fact that the *Per Curiam* Opinion did find that the specification of error pertaining to the seasonability of the supplementation of discovery responses and the trial court's erroneous imposition of sanctions was meritorious. The *Per Curiam* Opinion merely dismisses such meritorious specification of error as being non-prejudicial.

5. The Opinion further overlooks and misinterprets existing law in that, in order for an appellate court to find excessiveness of verdict the irregularity occurring at trial need not rise to the level of reversible error standing by itself. It need only be an "error or occurrence sufficient to incite prejudice." *Smith v. Archbishop of St. Louis,* 632 S.W.2d 516 (Mo. App. 1982):

> To successfully claim that the award is so excessive as to show jury prejudice defendant must present evidence of some error or occurrence at trial sufficient to incite prejudice. *Id.* at 524. (Emphasis added)

With respect to the specification of error that the jury was wrongfully instructed with respect to its damage determinations (16-19):

6. The Opinion itself, when it states "While the jury award of $1,520,000 based on this evidence was generous, particularly *IF* the jury found Giddens to be contributorily at fault to a substantial degree. . . ." proves the very point which Kansas City Southern attempted to make in this case. This Court does not know what the jury found regarding Mr. Giddens' fault. Neither did the Court of Appeals. Neither did the trial court. The reason they did not is the erroneous MAI damage instruction given to them by the trial court.

The *Per Curiam* Opinion says, p. 17, that the appellant abandoned this point by not explaining for the trial court how MAI unconstitutionally discriminates against railroads. This issue was "explained" and argued thoroughly to the trial court, more off the record than on. That is why, when the trial court went on the record to record the instructions, the court said: "All right. I want to go, finally over the instructions on the record." (emphasis added) (Tr. 565).

Even in the very brief record made, counsel for appellant, objected on the record to the jury instructions which are peculiar under MAI to Federal Employers' Liability Act cases, only i.e.:

> Defendant objects to the form. We will concede that this adheres to proper MAI format. We object because we believe MAI unconstitutionally discriminates against railroads by instructing in FELA cases differently than in other similar comparative fault cases. (Tr. 566)

And then further, specifically with respect to MAI 8.02, counsel for appellant stated: "We think (8.02) ought to be modified as per other comparative fault cases." (Tr. 568) True, the words "equal protection" do not appear of record. However, we respectfully submit that what "equal protection" is all about is equal treatment of citizens under the law which, the MAI instructional scheme is not.

We respectfully disagree with the Court's comment, *Per Curiam* Op. 19: "Here, however, KCS has not identified any way in which Missouri is discriminating disadvantageously against acts of negligence under FELA." What the Missouri instructional scheme for FELA cases does, by not requiring the jury to state percentages of fault which it has found, effectively thwarts meaningful review of a jury's verdict either by a trial court or an appellate court. It thus does, in the most fundamental sense, "discriminate disadvantageously" against the KCS and railroads. That this Court did not know

what the jury found is clearly established from the Court's Opinion, *Per Curiam* Op. P. *15,* "While the jury award of $1,520,000 based on this evidence was generous, particularly *IF* the jury found Giddens to be contributorily at fault to a substantial degree, . . ." (emphasis added) establishes that neither this Court nor the trial court could know "if," because of the instructional scheme which does discriminate disadvantageously against KCS and all railroads in FELA trials. The Opinion thus overlooks material matters of fact, law and the briefing before it in this regard.

With respect to the specification of error that the jury should have been allowed to know that Mr. Giddens was receiving a Railroad Retirement Board disability pension funded by this defendant *(Per Curiam* Op. 19-20):

7. The *Per Curiarn* Opinion. p. 20, dismisses this contention under "the law of the case doctrine." True. this matter was determined unfavorably to the KCS in the plaintiff's appeal of this case. *Giddens v. Kansas City Southern Ry. Co.,* 937 S.W.2d 300, 305 (Mo. App. 1996). However, this version *of Giddens* was an opinion of the Missouri Court of Appeals. The Missouri Supreme Court is not bound, under the law of the case doctrine, by an opinion of a lower court.

CONCLUSION

The jury in this case, the fact finder, was prevented from hearing impeachment fact evidence which had a direct, substantial and prejudicial effect on its excessive verdict. Thus, the jury, for no good, but erroneous, reasons, was operating partly in the dark. Similarly, when it came time for the trial court, the Court of Appeals and this Court to attempt to review the propriety of the jury's verdict, all of these courts were precluded from meaningful review by reason of the fact that none of the courts has any idea of what percentages of fault were found or what total damages the jury assessed.

This is because of an unconstitutionally defective instructional scheme applicable only in Federal Employers' Liability Act cases, which "discriminates disadvantageously" against railroads because they are effectively denied their right of judicial review of a jury's verdict. Thus, in certain material respects, the jury did not know, and in other material respects, the reviewing courts do not know. Justice this blind is no justice at all.

Respectfully submitted

LATHROP & GAGE L.C.

/s/ Harlan D. Burkhead
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APPENDIX C

TRANSCRIPT OF PROCEEDINGS

DEPOSITION TESTIMONY, 7/3/97, Ex. 89

Q. Your home there in Pollock, do you do your yard work there?

A. My kids do.

Q. You don't do any of it or do you do some of it?

A. I try to get out of all of it. I have to supervise, make sure—because they're still young, but they do it.

TRIAL TESTIMONY, 1/21/98, Tr. 399, *et seq.*

Q. Do you do yard work now?

A. Yes, sir, I can do my yard work.

* * * *

DEPOSITION TESTIMONY, 7/3/97, Ex. 89

Q. Can you rake?

A. Not really good. I can prop it on this hand and do like that, but we don't rake the yard anyway.

TRIAL TESTIMONY, 1/21/98, Tr. 399, *et seq.*

Q. Can you rake?

A. I can.

* * * *

DEPOSITION TESTIMONY, 7/3/97, Ex. 89

Q. Can you sweep, for instance, with your—

A. I sweep with my right hand.

TRIAL TESTIMONY, 1.21.98, Tr. 399, *et seq.*

Q. Can you sweep?

A. Yes, sir.

* * * *

DEPOSITION TESTIMONY, 7/3/97, Ex. 89

Q. Can you twist things with your left hand?

A. No. Like a jar or something?

Q. Right.
A. No. I have to use my right hand to open it.

TRIAL TESTIMONY, 1/21/98, Tr. 399, *et seq.*

Q. Can you twist with your left hand?
A. Can I twist? To a degree yes. My wrist, yes.

* * * *

DEPOSITION TESTIMONY, 7/3/87, Ex. 89

Q. Can you use your left hand, for instance, to break things like if you were breaking a stick between your left and right hand?
A. No.

TRIAL TESTIMONY, 1/21/98, Tr. 399, *et seq.*

Q. Can you go out and break sticks?
A. I can break with my right hand. I can hold them to a degree, with these fingers, in my left, yes.

* * * *

DEPOSITION TESTIMONY, 7/3/97, Ex. 89

Q. Can you carry limbs in your left hand?
A. I pull them with my right hand. I might if they're little ones. I could stack them in my arm.

TRIAL TESTIMONY, 1/21/98, Tr. 399, *et seq.*

Q. Do you carry limbs?
A. I can carry limbs.

* * * *

DEPOSITION TESTIMONY, 7/3/97, Ex. 89

Q. Like if you're picking up trash and throwing it, could you throw it with your left hand?
A. No, I don't—I don't know.

TRIAL TESTIMONY, 1/21/98, Tr. 399, *et seq.*

Q. Have you thrown trash?

A. I can throw trash. I can do any of that. You know, as long as I don't overload myself, I can do just about any of that, yes.

* * * *

DEPOSITION TESTIMONY, 7/3/97, Ex. 89

Q. Are you able to use your left hand to pull things?
A. No, sir.

TRIAL TESTIMONY, 1/21/98, Tr. 399, *et seq.*

Q. Can you pull on things?
A. I can.

* * * *

DEPOSITION TESTIMONY, 7/3/97, Ex. 89

Q. Can you use it to hold things and carry things?
A. No, sir.

TRIAL TESTIMONY, 1/21/98, Tr. 399, *et seq.*

Q. Can you carry things?
A. To a certain weight, yes.

* * * *

DEPOSITION TESTIMONY, 7/3/97, Ex. 89

Q. Can you, for instance, push a lawn mower?
A. If—I can push a little bit with my right hand.

TRIAL TESTIMONY, 1/21/98, Tr. 399, *et seq.*

Q. Can you push?
A. Yes.

APPENDIX D

[Logo]

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
CLERK

TELEPHONE
(573) 751-4144

November 14, 2000

Mr. Harlan D. Burkhead
Suite 2800
2345 Grand Boulevard
Kansas City, MO 64108-2684

In Re: Garry V. Giddens vs. The Kansas City Southern Railway Company Missouri Supreme Court No. SC82602

Dear Mr. Burkhead:

Please be advised that the Court entered the following order on this date in the above-entitled cause:

"Appellant's motion for rehearing overruled. Price, C.J., and Holstein, J., not participating."

Very truly yours,

THOMAS F. SIMON

/s/ Cynthia L. Turley
CYNTHIA L. TURLEY
Deputy Clerk, Court en Banc

cc:
Mr. Patrick S. O'Brien

APPENDIX E

INSTRUCTION NO. 10

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in the evidence. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax. If you find that plaintiff failed to mitigate damages as submitted in Instruction Number 8, in determining plaintiff's total damages you must not include those damages which would not have occurred without such failure. If you find plaintiff contributorily negligent as submitted in Instruction Number 7, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff.

MAI 8.02 [1996 Revision]

Submitted by plaintiff Garry Giddens

APPENDIX F

VERDICT

NOTE: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff Garry Giddens for personal injuries against defendant Kansas City Southern Railway Company, we, the undersigned jurors, find in favor of:

_____

(Plaintiff Garry Giddens) or (Defendant Kansas City Southern Railway Company)

NOTE: Complete the following paragraph only if the above finding is in favor of plaintiff Garry Giddens.

We, the undersigned jurors, assess the damages of plaintiff Garry Giddens at $_____(stating the amount).

NOTE: All jurors who agree to the above must sign below:

_____

_____

_____

_____

_____

_____

_____

MAI 36.01 [1980 Revision]

Submitted by plaintiff Garry Giddens

APPENDIX G

DEFENDANT'S INSTRUCTION CC

If you assess a percentage of fault to defendant in Verdict A, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the accident mentioned in the evidence. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax. You must state the total amount of plaintiff's damages in your verdict.

If you find that plaintiff failed to mitigate damages as submitted in Instruction Number ___, in determining plaintiff's total damages you must not include those damages which would not have occurred without such failure.

In determining the total amount of plaintiff's damages you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.

NOT IN MAI

MAI 8.02 [1996 Revision] *modified by* MAI 37.03 [1986 New] (*modified*)

Submitted by defendant The Kansas City Southern Railway Company

APPENDIX H

DEFENDANT'S INSTRUCTION EE

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff Garry Giddens for personal injury against defendant KCS, we, the undersigned jurors, assess percentages of fault as follows:

Defendant KCS	____% (zero to 100 %)
Plaintiff Garry Giddens	____% (zero to 100 %)
TOTAL	____% (zero to 100 %)

Note: Complete the following paragraph if you assessed a percentage of fault to defendant.

We, the undersigned jurors, find the total amount of plaintiff's damages for personal injury, disregarding any fault on the part of plaintiff to be $_____ (stating the amount).

Note: The judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Note: All jurors who agree to the above must sign below.

_____

_____

_____

NOT IN MAI

MAI 37.07 [1986 New] (modified)

Submitted by defendant The Kansas City Southern Railway Company

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 480

EICHEL

v.

NEW YORK CENTRAL RAILROAD CO.

Dec. 16, 1963.

PER CURIAM.

Petitioner, who had been employed by respondent New York Central Railroad for 40 years, brought this action against respondent under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. § 51 et seq., in the District Court for the Southern District of New York. The complaint alleged that in 1960, as a result of respondent's negligence petitioner suffered a permanently disabling injury. The jury returned a verdict of $51,000 for petitioner and the District Court entered judgment in accordance with that verdict. Respondent offered evidence that petitioner was receiving $190 a month in disability pension payments under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U.S.C. § 228b(a) 4.

This evidence was offered for the purpose of impeaching the testimony of petitioner as to his motive for not returning to work and as to the permanency of his injuries. The trial court excluded the evidence in response to the objection of petitioner's counsel. The Court of Appeals for the Second Circuit reversed, holding it prejudicial error to exclude the evidence of the disability pension, and remanded "for a new

trial, limited, however, to the issues of injury and resulting damages * * *." 2 Cir., 319 F.2d 12, 14. The court affirmed the judgment as to the determination of negligence." Ibid. We grant certiorari and reverse the judgment of the Court of Appeals.

Respondent does not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner. Thus it has been recognized that:

> "The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers. * * * The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer." *New York, N. H. & H. R. Co. v. Leary*, 1 Cir., 204 F.2d 461, 468, cert. denied, 346 U.S. 856, 74 S.Ct. 71, 98 L.Ed. 370.[1]

Respondent argues that the evidence of the disability payments, although concededly inadmissible to offset or mitigate damages, is admissible as bearing on the extent and duration of the disability suffered by petitioner. At the trial counsel for respondent argued that the pension would show "a motive for [petitioner's] not continuing work, and for his deciding not to continue going back to work after the last accident." On the basis of this argument the Court of Appeals concluded that the disputed evidence should have been admitted because: "Its substantial probative value cannot reasonably be said to be outweighed by the risk that it will * * * create substantial danger of undue prejudice through

---

[1] *See Sinovich v. Erie R. Co.*, 3 Cir., 230 F.2d 658, 661; *Page v. St louis S. Ray. Co.*, 5 Cir., 312 F.2d 84, 94. *see also* Gregory and Kalven, Cases and Materials on Torts (1959), pp. 480-482; McCormick, Damages (1935), p. 310 n. 2; Comment, 38 Mich.l.Rev.1073.

being considered by the jury for the incompetent purpose of a set-off against lost earnings." 310 F.2d, at 20.

We disagree. In our view that likelihood of misuse by the jury clearly outweighs the value of this evidence.[2] Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat.309, as amended 45 U.S.C. § 228b(a) 4, were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton v. Socony Mobil Oil Co.*, Inc., 375 U.S. 34, 84 S.Ct. 1.[3] It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse.[4] Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact. We hold therefore that the District Court properly excluded the evidence of disability payments. Accordingly, the judgment of the Court of Appeals is reversed and the case remanded for proceedings consistent with his opinion.

Reversed and remanded.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice HARLAN, concurring in part and dissenting in part.

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[2] Cf. McCormick, Evidence (1954), c. 19; 2 Wigmore, Evidence (1940), § 282a.

[3] See Kalven. The Jury, the Law, and the Personal Injury Damage Award, 19 Ohio St. LJ 158, 169.

[4] See notes 1-3, supra.

Once again I am obliged to record my view that certiorari should not have been granted in a case of this kind, involving only a question of the admissibility of evidence in a suit under the Federal Employers' Liability ACT, 35 Stat. 65, as amended, 45 U.S.C. § 51. See my dissenting opinion in *Tipton v. Socony Mobil Oil Co., Inc.*, earlier this Term, 84 S.Ct., p.3.

On the merits, I agree with the majority that the judgment below should be reversed, but for different reasons. Whether or not evidence that the petitioner was receiving disability pension payments under the Railroad Retirement Act of 1937 50 Stat. 307, as amended, 45 U.S.C. § 228a, should have been admitted depends on a balance between its probative bearing on the issue as to which it was offered, in this case the respondent's claim that petitioner was a malingerer, and the possibility of prejudice to the petitioner resulting from the jury's consideration of the evidence on issues as to which it is irrelevant. When a balance of this sort has to be struck, it should, except in rare instances, be left to the discretion of the trial judge, subject to review for abuse. See Uniform Rules of Evidence, Rule 303. It is he who is in the best position to weigh the relevant factors, such as the value of the disputed evidence as compared with other proof adducible to the same end and the effectiveness of limiting instructions. Believing that this rule should have been followed here, I concur in reversing the judgment below, which not only held the evidence not inadmissible as a matter of law but also directed its admission on retrial.

For the same reasons, however, I dissent from the majority's holding that the evidence is required to be excluded. I see no reason why evidentiary questions should be given different treatment when they arise in an F.E.L.A. case than when they arise in other contexts

APPENDIX J

---

§ 51. Liability of common carriers by railroad, In Interstate or foreign commerce, for Injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of Interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

(2)

Supreme Court, U.S.
FILED
MAR 12 2001
CLERK

No. 00-1286

In The

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

GARRY V. GIDDENS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Lolpp

QUESTIONS PRESENTED

1. Whether KCS's claim that it was entitled to a set-off of Railroad Retirement disability payments is properly before the Court when it was not presented to or decided by the Missouri Supreme Court.

Whether the holding of *Eichel v. New York Central R. Co.*, 375 U.S 253 (1963), that Railroad Retirement disability payments may not be set-off against an award of damages in an FELA case, a matter of statutory construction of the FELA and the Railroad Retirement Act, should be disturbed when Congress has not amended either statute to provide for such a set-off and *Eichel* and the authorities upon which it relied properly construed these statutes.

Whether the Missouri courts below erred in excluding evidence of Railroad Retirement disability payments received by plaintiff under the standard established by *Eichel*, and followed by Missouri caselaw, of determining whether the probative value of the evidence of disability payments is outweighed by the danger of prejudicial effect on the jury.

2. Whether KCS's Due Process and Equal Protection Claims under the U.S. Constitution are properly before the Court when the Missouri Supreme Court rejected those claims on the basis of an independent and adequate state ground of decision.

Whether the damage instruction and verdict form used in this case, modeled on Missouri Approved Instructions, violated federal statutory or constitutional law,

QUESTIONS PRESENTED – Continued

under the FELA, the Due Process Clauses of the Fifth and Fourteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment or the Supremacy Clause, when they provided for the *jury*, rather than the judge, to reduce damages in an FELA in proportion to contributory negligence, in accordance with the plain language of 45 U.S.C. § 53, and when the damage instruction and verdict form KCS claims should have been given require the judge, rather than the jury, to reduce the damages, contrary to 45 U.S.C. § 53.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Garry V. Giddens (hereinafter "Giddens" or "plaintiff"), respectfully requests that the Court deny the Petition for a Writ of Certiorari filed herein by Petitioner Kansas City Southern Railway Company (hereinafter "KCS" or "defendant").

OPINIONS BELOW

The opinion of the Missouri Supreme Court, en banc, in this case is reported at 29 S.W.3d 813. It is reproduced in the Petition, in Appendix A to the Petition. Because the opinion of the Missouri Supreme Court ruled one of the issues in part on the basis of the law of the case, the opinion in the prior appeal, *Giddens v. Kansas City Southern Railway Co.*, 937 S.W.3d 300 (Mo.App.1996) (*"Giddens I"*), is reproduced in the Appendix to this Brief For Respondent In Opposition to Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

KCS invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). As will be set forth below, plaintiff Giddens submits that this Court is without jurisdiction of certain of the questions KCS seeks to present because the judgment of the Missouri Supreme Court on these points rests upon an independent and adequate state ground of decision. Plaintiff agrees that the Petition was filed within ninety (90) days of the denial of KCS's Motion for Rehearing in the Missouri Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those provisions mentioned in the Petition, plaintiff Giddens submits that the Petition herein also involves the provisions of Section 3 of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 53, which provides that contributory negligence will not bar recovery in an FELA case but that "***the damages shall be diminished by the jury*** in proportion to the amount of negligence attributable" to the employee. (emphasis supplied). It also involves Section 5 of the FELA, 45 U.S.C. § 55, which defines and limits the set-offs which may be allowed in an FELA case. The full text of these statutory provisions is set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner KCS has filed a Petition for Writ of Certiorari seeking review of the decision of the Missouri Supreme Court, en banc, affirming a judgment in favor of Respondent Garry V. Giddens, in an action under the FELA, 45 U.S.C. § 51, et seq., for severe personal injuries sustained by plaintiff during the course of his employment by KCS. Plaintiff was 44 years of age at the time of the most recent trial, and is now 47. He has only a 12th grade education. Prior to his injury in May, 1989, he had worked for KCS since April, 1973, and was a working foreman at the time of his injury. This was the third time this case has been tried to a jury. In each of the three trials the jury has returned a verdict in favor of plaintiff Giddens and against KCS on liability. The trial court ordered a new trial after the first verdict in favor of plaintiff in the sum of $500,000, due to failure to give a mitigation of damages instruction requested by KCS. Upon retrial, the

jury returned a verdict in favor of plaintiff in the sum of $1,400,000. The trial court granted KCS's motion for new trial, based upon alleged impropriety in plaintiff's jury argument, and the trial court's opinion that it had erred in excluding evidence of Railroad Retirement disability payments received by plaintiff. The Missouri Court of Appeals affirmed the order granting KCS a new trial, refusing to disturb the trial court's discretionary finding that parts of plaintiff's jury argument had been improper. *Giddens I*, 937 S.W.2d 300 (Mo.App.1996). In *Giddens I*, the Court of Appeals also held that the trial court had erred in granting a new trial based upon its refusal to admit the evidence offered by KCS of Railroad Retirement disability payments, holding the trial court had properly excluded that evidence in the first instance. Plaintiff's application for transfer to the Missouri Supreme Court, opposed by KCS, was denied. Upon retrial, the jury returned a unanimous verdict in favor of Plaintiff in the amount of $1,520,000. A panel of the Missouri Court of Appeals, Western District, affirmed the judgment. The Missouri Supreme Court granted KCS's application to transfer the case to the Missouri Supreme Court. The record and briefs filed in the Court of Appeals were also the record and briefs before the Supreme Court, which then resolved the case "as if on original appeal." Rule 83.09, Missouri Rules of Civil Procedure. The Missouri Supreme Court affirmed the judgment of the trial court. *Giddens v. Kansas City Southern Railway Co.*, 29 S.W.3d 813 (Mo. banc 2000). KCS has now filed its Petition for Writ of Certiorari seeking review of that decision.

ARGUMENT

I.

KCS's Claim That It Should Have Been Allowed A Set-Off Based On Railroad Retirement Disability Payments Is Not Properly Before This Court Because It Was Not Presented To Or Decided By The Missouri Supreme Court, And Is Without Merit In Any Event. In Excluding Evidence Of Such Disability Payments, The Missouri Courts Properly Applied The Same Standard KCS Urges This Court To Adopt, That Of Weighing Probative Value Against Prejudicial Effect. No Error Has Been Shown.

As part of its first Question Presented, KCS asks this Court to grant a writ of certiorari to consider whether KCS should have been granted a set-off of Railroad Retirement disability payments against the award of damages in this case. KCS argues in this Court that it should receive a set-off of $223,667. This is the amount of the Railroad Retirement disability payments received by plaintiff in the past and the present value of the amount of Railroad Retirement disability payments KCS projects plaintiff will receive in the future that KCS deems attributable to its payments to the Railroad Retirement system.

However, this Court is without jurisdiction to consider this question because it was not presented or decided on appeal in the court below. KCS's claims of error on appeal, as set forth in its Points Relied On in its appellate brief in the courts below, did not include any claim that the trial court erred by not setting off the damage award by Railroad Retirement disability payments, as it now urges in this Court. The Missouri Court of Appeals, and the Missouri Supreme Court after transfer, thus did not consider or decide any such claim of

alleged error. Nor was such a claim of alleged error raised or decided in *Giddens I.*

To confer jurisdiction upon this Court, the issue must have been presented in such a manner that it was necessarily decided by the Missouri Supreme Court. "[W]hen, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York*, 394 U.S. 580, 582 (1969). *See also Webb v. Webb*, 451 U.S 493 (1981); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S 71 (1988); *Adams v. Robertson*, 520 U.S. 83 (1997). No such showing can be made by KCS in this case, because the claim was simply not raised on appeal in the Missouri courts.

Additionally, review of this Court's decision in *Eichel v. New York Central R. Co.*, 375 U.S. 253 (1963), and the authorities relied upon by *Eichel*, make it clear that as a matter of substance the petition for writ of certiorari should not be granted on this issue. The *Eichel* opinion could not state more clearly that Railroad Retirement disability payments may not be used to offset or mitigate damages. 375 U.S at 255. In so stating, this Court relied upon and cited with approval the opinion of the First Circuit in *New York, N.H. & H.R. Co. v. Leary*, 204 F.2d 461 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953) *Leary's* holding, that Railroad Retirement disability benefits may not be used to offset or mitigate damages, was based upon statutory construction of Section 5 of the FELA, 45 U.S.C. § 55, along with the Railroad Retirement Act.

45 U.S.C § 55 very specifically defines and limits the set-offs that may be claimed by a defendant railroad in an FELA action. It provides (emphasis supplied):

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: ***Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.**

The enumeration of these specific items which may be set off in an FELA case implies the exclusion of any other permissible set-offs. The structure of § 55 also clearly indicates that no set-offs other than those enumerated are permissible in FELA cases, because the set-offs provided for in § 55 are listed only in a proviso to the general provision of the statute that all devices exempting a railroad from liability under the FELA are void. The holding of *Leary*, adopted by this Court in *Eichel*, was that Railroad Retirement disability payments were not among the set-offs that could lawfully be taken in an FELA case within the meaning of § 55, and therefore no set-off was permissible. The *Leary* court reasoned as follows:

> Under § 55 of the Federal Employers' Liability Act, 45 U.S.C.A. § 55, the defendant's right of set-off for certain contributions to employee disability payments is limited to amounts paid "on account of the injury or death for which said action was brought." The Railroad Retirement Act of 1937, 45 U.S.C.A. § 228a et seq. authorizes disability payments only for employees who have reached sixty years of age or have completed thirty years of service. We think these age and service requirements for

> disability payments remove these payments from the coverage of § 55 of the Federal Employers' Liability Act. Accident indemnity strictly speaking does not seem to be within the Congressional intent disclosed in the Retirement Act of 1937. *Hetrick v. Reading Co.*, D.C.N.J.1941, 39 F.Supp. 22. Thus, this is not a set-off authorized by § 55 because we think the retirement fund is not an "insurance, relief benefit, or indemnity" within the meaning of that section. The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers. The retirement fund is supported by tax collections from the employer and employee, 26 U.S.C. §§ 1500, 1520, and to a limited extent by the general public, 45 U.S.C.A. §§ 228c, 228o, 228p. The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer. See *McCarthy v. Palmer*, 2 Cir., 1940, 113 F.2d 721, certiorari denied, 1940, 311 U.S. 680, 61 S.Ct. 50, 85 L.Ed. 438.

New York, N.H. & H.R. Co. v. Leary, 204 F.2d 461, 467-68 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953). It has been more than 37 years since this Court adopted this construction of § 55 and the Railroad Retirement Act. It is a construction that follows readily from the plain language used by Congress in these statutes. Congress has not amended either § 55 or the Railroad Retirement Act to allow railroad defendants to set-off Railroad Retirement disability payments in FELA actions. KCS cites no case that has held that such a set-off should be allowed. There is no conflict among the federal or state courts on this point. If Congress wished to allows such a set-off in the face of this settled statutory construction, it could have amended either § 55 or the Railroad Retirement Act to do so. It has

chosen not to so amend either statute. "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 736 (1977). There is a "presumption of adherence" to this Court's prior decisions "concerning legislative enactments." *Id.* at 736-37. There is no reason for the Court to re-examine this issue of statutory construction. The writ should be denied.

In the remainder of its first Question Presented, KCS asks this Court to review whether the trial court properly sustained plaintiff's objections to admission of evidence of the Railroad Retirement disability payments received by plaintiff, when offered by KCS to prove that such payments gave him a disincentive to mitigate his earnings loss by finding employment because his earnings might decrease his railroad retirement disability benefit. KCS claims that there is a split between the circuits and state supreme courts as to whether "there should be a *per se* rule excluding receipt of such evidence or whether such ruling should be left to trial court discretion as are other evidentiary matters under Rule 403, Federal Rules of Evidence and state rules of evidence." Petition at 8. Rule 403 of the Federal Rules of Evidence provides for the exclusion of evidence, even if logically relevant, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." It is most respectfully submitted that the "conflict" KCS asks this Court to resolve is not presented by this case and is, in any event, for the most part non-existent.

The Missouri Supreme Court addressed the merits of this issue in part, stating that "as a general rule" evidence

of Railroad Retirement disability payments is not admissible in an FELA case "because its probative value is outweighed by the potential prejudicial effect on the jury," and relying on *Eichel*. 29 S.W.3d at 824, Petition at 18a. It thus did not regard *Eichel* as establishing a *per se* rule of inadmissibility. It did not address the argument that the "door had been opened" to the admission of such evidence, based upon the rule of the law of the case (29 S.W.3d at 824-825; Petition at 18a), since the issue of the admissibility of the disability payments on this basis had been resolved against KCS in *Giddens I*. The evidence submitted by KCS to the trial court on retrial in support of admission of disability payments, leading to the judgment now before the Court, was identical to that in *Giddens I*, because it consisted of reading portions of the record from *Giddens I* and depositions previously read during the earlier trial. *Giddens I* thus contains a fuller explanation of the exclusion of the disability payments in this case, and is reproduced in the Appendix to this Brief. *Giddens I*, and the cases upon which it relied, did not establish a *per se* rule of exclusion either. They recognize that there may be circumstances under which such evidence should be admitted because the probative value of disability payments outweighs the prejudicial effect in those cases. *See, e.g., Moore v. Missouri Pacific R. Co.*, 825 S.W.2d 839, 842-43 (Mo. banc 1992) (affirming admission of Railroad Retirement disability payments in an FELA case).

This Court's decision in *Eichel* did not establish a *per se* rule of exclusion of Railroad Retirement disability payments. Indeed, although *Eichel* was decided before Rule 403 was adopted, *Eichel* analyzed the issue in terms

weighing probative value against prejudicial effect. Evidence of the monthly Railroad Retirement disability payments was offered for "the purpose of impeaching the testimony of petitioner as to his motive for not returning to work and as to the permanency of his injuries," 375 U.S. at 354, and to "show a motive for (petitioner's) not returning work and for his deciding not to go back to work after the last accident." 375 U.S. at 255-56. The district court sustained an objection to this evidence but the Court of Appeals reversed, holding the probative value of the disability payments was not outweighed by the "danger of undue prejudice through being considered by the jury for the incompetent purpose of a set-off against lost earnings." 375 U.S. at 255. In reversing the Court of Appeals, in effect approving the district court's action in excluding the payments, this Court weighed probative value against prejudicial effect and held:

> We disagree. In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U.S.C. § 228b(a) 4, were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34, 84 S.Ct. 1. It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must

> recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact.

Eichel, 375 U.S. at 255 (footnotes omitted).

Contrary to KCS's argument, *Eichel's* holding that Railroad Retirement disability payments could not be set-off from the damages in an FELA case was not dicta. It was a necessary predicate to the evidentiary holding that the probative value of the evidence was outweighed by its prejudicial effect. *Green v. Denver & Rio Grand Western R. Co.*, 59 F.3d 1029, 1033 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995). Part of the prejudicial effect recognized in *Eichel* was the substantial likelihood of misuse of evidence of disability payments as a set-off of damages for lost earnings. The admission of such evidence may also improperly influence the jury's consideration of liability issues. *Green*, 59 F.3d at 1033-34.

Eichel gave the lower courts very specific and direct guidance about how probative value should be weighed against prejudicial effect in the normal FELA case. It clearly states that in the normal case in which the issue arises, the probative value of disability payments will most likely be outweighed by its prejudicial effect, when offered as evidence of malingering or to establish a motive for not working. The lower courts have followed the guidance given by *Eichel*, and have generally excluded evidence of Railroad Retirement disability payments.

The lower courts, however, including Missouri courts and specifically the Court of Appeals in *Giddens I*, have also recognized exceptions to the general guidance given by *Eichel* about how the probative value of disability payments should be weighed against prejudicial effect. One established exception is when the issue of the plaintiff's financial status is injected into the case in such a

way as to suggest financial distress. *See Moore v. Missouri Pacific R. Co.*, 825 S.W.2d 839, 842-43 (Mo. banc 1992); *Gladden v. P. Henderson & Co.*, 385 F.2d 480 (3rd Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968); *Lange v. Missouri Pacific R.R. Co.*, 703 F.2d 322 (8th Cir. 1983). In such a case, the court may properly conclude that the probative value of the evidence of disability payments is *not* outweighed by its prejudicial effect, and may allow admission of that evidence. Thus, if a plaintiff simply makes a claim for wage loss due to his injury, and presents evidence of his efforts, if any, to mitigate his wage loss, application of *Eichel* will generally result in the conclusion that disability payments should not be admitted because the probative value is outweighed by prejudicial effect. But if a plaintiff receiving Railroad Retirement disability payments goes beyond that, injecting his financial status into the case in such a way as to suggest financial distress, the railroad is entitled to rebut that suggestion by showing the monthly disability payments. In *Giddens I*, the Court of Appeals actually expanded this exception to the guidance given by *Eichel*, stating that it was not limited to cases in which the issue of financial distress is injected into the case by plaintiff's own testimony, but also included cases in which the issue was injected by another witness. *Giddens I*, 937 S.W.2d at 304-305, App. 8-9.

In this case, KCS contends that the testimony of plaintiff's vocational rehabilitation expert, Dr. Samuel Bernstein, opened the door to evidence of his disability payments in this manner. In discussing, his recommendations for plaintiff's vocational retraining or rehabilitation, he testified that he felt plaintiff "was well motivated." He believed that plaintiff "wanted to do something with his life. He's interested in working." *Giddens I*, 937 S.W.2d at 304, App. 7. In *Giddens I*, the Court of Appeals held this

testimony did not inject plaintiff's financial status into the case, or suggest financial distress, and did not open the door to admission of disability payments. This testimony on its face refers to plaintiff's psychological motive for wanting to work, for wanting "to do something with his life," not to motivation based upon dire financial distress. *Giddens I* held that the trial court had properly excluded the evidence at trial in the first instance, and that it had erred in later granting a new trial based on the exclusion of the evidence of the disability payments. The Missouri Supreme Court held this was the law of the case. The basis for this result is clearly a determination that on this record, and under *Eichel*, the probative effect of the evidence of disability payments was outweighed by its prejudicial effect in this case. *Giddens I* was explicit in recognizing this was the key to analysis under *Eichel*, stating that: "*Eichel* instructs that the relevancy of the evidence is not the key issue but rather that it is the balancing of unduly prejudicial evidence against its probative value."*Giddens I*, 937 S.W.2d at 304, App. 6. It is apparent this is the same basic principle contained in Rule 403 of the Federal Rules of Evidence.

Because this is the same standard KCS asks this Court to grant certiorari to apply, this case simply does not present the issue of whether such a Rule 403 type approach should be applied to evidence of Railroad Retirement disability payments, in preference to a rule of *per se* exclusion. In reality, KCS is asking this Court to reweigh probative value against prejudicial effect on the facts of this case because it disagrees with the way the Missouri courts performed this task.

KCS misrepresents and distorts the evidence in this case in its effort to induce this Court to undertake this task. KCS represents to this Court that in October 1992,

plaintiff "advised that he was no longer physically able to do the job he had done in the past for the railroad." Petition at 5. It asserts this occurred because plaintiff realized that he had enough service at that point that he could stop working and qualify for Railroad Retirement occupational disability with his accrued vacation time. There is no evidence of any kind to support the latter claim. And the first is completely contrary to the record. The evidence at trial was that it was KCS that determined that plaintiff would not be allowed to return to work in October 1992, after it required him to be field tested for his ability to do his job. The claim KCS makes to this Court, that plaintiff "manipulated" the system to qualify for Railroad Retirement occupational disability, rests on these and other factually inaccurate statements in the Petition.

Plaintiff was a foreman for KCS. KCS requires its foremen to be working foremen. They must be able to perform the same heavy manual labor as the men they supervise. Plaintiff's left hand was crushed when a chain holding up a section of railroad track and a tie broke, pinning his hand between the rail and another tie his hand had been placed upon. The full weight of the rail was on top of his hand for several minutes until it could be freed.

After receiving emergency treatment, plaintiff was referred by KCS to Dr. Ramey for treatment. Dr. Ramey was his primary treating doctor. Plaintiff had the first of eight surgeries on his hand at the end of May 1989. He had further hand surgery in September 1989 and February 1990. Dr. Ramey released him to return to work at KCS in May 1990, and he resumed work in June 1990, after being examined and cleared by the KCS company doctor. Clearance by the KCS company doctor was

required by company procedure before he could return to work. He worked until December 1990, when he took some vacation prior to further surgery in January 1991. He resumed work for KCS in May 1991 after again being cleared by the company doctor. He was able to do his job but had to have the men help him out. He continued until shortly before he had another surgery with Dr. Ramey in January 1992. Dr. Ramey then cleared him to return to work with some restrictions.

But when the company doctor then examined him in February 1992, the company doctor refused to clear him to return to work, noting he was not physically qualified to perform essential job duties, and that he was a "definite safety risk" when it came to lifting heavy objects and performing fine movement with the left hand. He then had additional surgery in April 1992, and also had an infection that required him to be hospitalized. He had another surgery in July 1992.

In late summer 1992, Dr. Ramey released plaintiff to return to work with the same restrictions as to lifting with his left hand, and use of vibrating tools and sledge hammers that he had as of January 1992. KCS did not then have plaintiff re-examined by a company doctor to clear him for return to work, but nevertheless ordered him to report for a field test, to evaluate his ability to perform his duties. Under KCS procedures, once plaintiff had been released by his doctor and cleared for duty by the company doctor, KCS was entitled to require plaintiff to pass such a test before returning him to service. When plaintiff was unable to successfully complete the field test, KCS refused to let plaintiff return to service. Plaintiff was taken off the payroll on October 31, 1992 and was not offered another position. This sequence of events was

described and reviewed in part by the Court of Appeals in *Giddens I.* 937 S.W.2d at 302, App. 2-3.

Plaintiff has now had eight surgeries, had three hundred and twenty stitches in his left hand and had eight pins inserted in his fingers. The uncontroverted medical testimony of Dr. Ramey and Dr. Romero indicated that Plaintiff had a significant impairment of his left hand and left upper extremity. Plaintiff cannot make a fist with his left hand. Plaintiff cannot open his left hand flat.

Plaintiff was 44 years of age at the time of trial, and has only a 12th grade education. Prior to his injury in May, 1989, he had worked for the railroad since April 3, 1973, ever since he was 19 years of age. Dr. Samuel Bernstein, a rehabilitation specialist, testified that plaintiff would be unable to do heavy work, or work requiring grasping or climbing. He will be restricted to light and sedentary work, and most such jobs require the use of two hands. The jobs he will able to do will be minimum wage jobs, and, even if he finds such employment, he will suffer periods of unemployment. Plaintiff has been medically disqualified from returning to work for KCS by KCS's own physicians because he would be a definite safety risk when it comes to lifting heavy objects and performing fine motor movements with his left hand. As of the time of trial, plaintiff had unsuccessfully submitted more than 60 applications for employment.

It is apparent that plaintiff's time off work was necessitated by his injuries and multiple surgeries. He returned to work whenever his treating doctor, who had been selected by KCS, and the KCS company physician cleared him to do so. His injuries were real and substantial. They were not feigned. Plaintiff made no announcement in October 1992 that he could no longer physically do the job he had done in the past. That determination was

made by KCS after the field test. And plaintiff did not consult an attorney until he was taken off the payroll on October 31, 1992. The timing of when all this occurred was dictated by the scheduling of his surgeries, the opinions of his treating doctor and the company doctor, and the timing of KCS's decision to field test him and remove him from the payroll. There is certainly no support in the record for the claim that plaintiff could control any of this in order to "manipulate" the system.

In this regard, *McGrath v. Consolidated Rail Corporation*, 136 F.3d 838 (1st Cir. 1998), the primary case upon which KCS relies, is factually distinguishable. In *McGrath*, the railroad alleged plaintiff was feigning physical disability to avoid work and continue receiving disability payments. In this case, there can be no possible claim that plaintiff feigned his injuries. And in this case, KCS's own company doctor has disqualified plaintiff from performing the duties of his railroad job. It is also questionable whether *McGrath* gave due attention to *Eichel's* guidance in weighing probative value against prejudicial effect under Rule 403. In this regard, it is interesting to note that to date no subsequent decision has followed *McGrath* on this point.

The Missouri courts below applied the same standard KCS urges this Court to adopt, that of weighing the probative value of evidence of disability payments against its prejudicial effect. There has been no showing that the Missouri courts below applied this standard improperly in determining that such evidence was properly excluded in this case. The writ should be denied.

II.

This Court Is Without Jurisdiction Of KCS's Due Process And Equal Protection Claims Because The Judgment As To Those Issues Rests Upon An Independent And Adequate State Ground Of Decision. The Due Process Claim Is Also Without Merit As A Matter Of Substance. KCS's Equal Protection And Supremacy Clause Claims Are Without Merit Because The Missouri Instruction And Verdict Form Requiring That The Jury, Rather Than The Judge, Reduce Damages For Contributory Negligence In An FELA Case, Conforms To The Explicit Directive Of The Plain Language Of The Controlling Federal Statute, 45 U.S.C. § 53, Stating That The Damages "Shall Be Diminished By The Jury."

KCS claims the damage instruction used in this case to instruct the jury to reduce damages in proportion to the contributory negligence attributed to plaintiff, if any, and the verdict form, violated the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. This Court is without jurisdiction of that claim because KCS failed to object the damage instruction and verdict form given by the trial court on due process grounds at trial. Nor did it object to the refusal of its proffered damage instruction and verdict form on due process grounds at trial. The Missouri Supreme Court declined to address the merits of the due process claim for that reason. 29 S.W.3d at 823; Petition at 16a. This constitutes an independent and adequate state ground of decision that bars review in this Court.

Rule 73.03 of the Missouri Rules of Civil Procedure provides in part that:

> Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give

> instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

The requirement of "stating distinctly the matter objected to and the grounds of the objection" is the same as that set forth in Rule 51 of the Federal Rules of Civil Procedure.

At trial, during the instruction conference, KCS objected to the verdict directing instruction "because we believe MAI unconstitutionally discriminates against railroads by instructing in FELA cases differently than in other similar comparative fault cases." (T. 566). No specific provisions of either the Missouri or United States constitutions were specifically mentioned. No specific reference was made to Due Process, Equal Protection, or the Supremacy Clauses of the U.S. Constitution. *See Webb v. Webb*, 451 U.S. 493, 501 (1981) (to confer jurisdiction on this Court at a minimum there should be no doubt that a *federal* claim was presented in state court and that state court was "apprised of the nature and substance of the federal claim at the time and in the manner required by state law"); *Bankers Life and Casualty Co.*, 486 U.S. 71 (1988) (claim that punitive damage award "was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles" insufficient to support consideration of Contract Clause, Due Process or Eighth Amendment claims in this Court).

The only objection made at trial by KCS to the damage instruction, based on Missouri Approved Instructions (MAI), MAI 8.02, was as follows:

> Mr. Ray: The only objection defendant would have would be that we think it ought to

be modified as per other comparative fault cases.

The Court: In other words, to follow the chapter 37 format?

Mr. Ray: Right. (T. 569)

The only objection to the verdict form was:

Mr. Ray: Yes, Your Honor. Once again, we believe it ought to follow the pattern instructions set out in chapter 37 of MAI, as done in other comparative fault cases. (T. 570).

These objections in no way referred to the concept of due process. They certainly gave the trial court no intimation of the argument KCS advanced on appeal, and now makes in this Court: that the damage instruction and verdict form violated KCS's due process rights under the Fifth and Fourteenth Amendments on the ground they deny meaningful appellate review of the jury's determination of contributory negligence and damages. As the Missouri Supreme Court noted, in refusing to reach the merits of the due process argument on appeal because it had not been preserved, under Missouri law:

> Where an alleged error on appeal relating to an instruction differs from the objections made to the trial court, the error may not be reviewed on appeal.

29 S.W.3d at 823; Petition at 16a. Rule 51 of the Federal Rules of Civil Procedure also requires that "[t]he grounds of the objection must be specifically stated, and the error claimed on appeal must be based on the same grounds stated in the objection." *Starks v. Rent-A-Center*, 58 F.3d 358, 361 (8th Cir. 1995). Rule 73.03 of the Missouri Rules of Civil Procedure, like Rule 51 in the federal system,

serves a legitimate state interest in the proper and orderly presentation of objections to instructions.[1]

Thus, the Missouri Supreme Court's rejection of KCS's federal constitutional due process argument rests upon an independent and adequate state ground of decision, and this Court is without jurisdiction to review the due process arguments KCS raises in its Petition. *E.g., Herb v. Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Herndon v. Georgia*, 295 U.S. 441 (1935); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1917); *Eustis v. Bolles*, 150 U.S. 361 (1893); *Murdock v. City of Memphis*, 20 Wall. (U.S.) 590 (1875). The adequacy and independence of the state ground is evident from the face of the opinion of the Missouri Supreme Court, and fully meets the test of *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

Further, there is no merit to KCS's due process argument. In effect, KCS argues that when there are disputes as to factual issues the jury must resolve to reach its damage award, a general verdict violates due process as a matter of federal constitutional law. KCS cites no case holding that general verdict in an FELA case involving claims of contributory negligence violates due process. Nor does KCS cite any case outside the FELA area holding that a general verdict in a case with factual disputes relating to damages violates due process as a matter of federal constitutional law. It cites no case holding a general verdict violates due process because a general verdict does not allow the court to check to see whether the jury

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[1] Prior to the effective date of the present Rule 70.03, in 1994, Missouri practice allowed a party to raise its specific objections to instructions for the first time in its motion for new trial, a provision that encouraged counsel to engage in "sandbagging" of possible claims of instructional error at trial.

really followed the court's instructions, or because a general verdict does not include specific findings about specific factual issues, to aid to review of whether the damage award is against the weight of the evidence. Indeed, such a holding would appear to be an extraordinary and unprecedented assertion of federal authority over state practice, because KCS's argument would logically require such a holding to apply to general verdicts in causes of action arising under state law, as well as those arising under federal law. Nor does KCS cite any historical practice in support of its federal due process claim. *See Griffin v. United States*, 502 U.S. 46, 51 (1991); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276-277 (1856). KCS's due process claims are without merit.

The Missouri Supreme Court appears to have accepted that KCS's trial objection of unconstitutional discrimination, as outlined above, was sufficient to invoke equal protection principles. However, it also determined that the manner in which KCS presented its equal protection claim on appeal was insufficient to preserve the issue under Missouri law. The argument portion of KCS's brief on appeal did not cite any equal protection decision of this Court or any other court in support of its argument. It did not make any reference to the standards or tests used to apply the Equal Protection Clause of the Fourteenth Amendment, much less explicitly apply the applicable standards to explain how the damage instruction and verdict form are claimed to violate equal protection. Under well established Missouri practice, the failure to cite relevant authority in the argument in support of a point relied on, or to offer an explanation as to why such authority is unavailable, is deemed an abandonment of the argument. *E.g., Martin v. McNeill*, 957 S.W.2d 360, 365, 366 (Mo.App.1997); *Shiyr v. Pinckney*, 896 S.W.2d 69, 71

(Mo.App.1995). The Missouri Supreme Court rejected KCS's equal protection argument on this ground, 29 S.W.3d at 823-24; Petition at 16a-17a. This, too, is an independent and adequate state ground that bars review in this Court.

KCS's failure to cite or discuss any authority under the Equal Protection Clause of the Fourteenth Amendment is not surprising, because such a discussion would have immediately revealed that its equal protection claim is completely without merit.

This case does not involve any suspect classification or fundamental right. There is no basis here for invoking strict or intermediate level scrutiny in this case. There is no basis for any heightened level of scrutiny at all. Instead, the test of equal protection is whether the Missouri FELA damage instruction and the verdict form in this case fail to rationally further a legitimate state interest. *E.g., Burlington Northern Railroad Co. v. Ford*, 504 U.S. 648, 651 (1992). If they may be understood to rationally further a legitimate interest, the equal protection claim must fail. *Id.*

The rationale for the MAI FELA damage instructions and verdict form, as set forth in the Committee Comment, easily meets this test, because the instruction, MAI 8.02, is designed to conform to the explicit text of the FELA itself. 45 U.S.C. § 53, specifically states that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

The Committee Comments (1996 revision) to MAI 8.02, Missouri Approved Instructions, Civil (5th ed. 1996) (MAI), at 103 explain that:

> The submission of comparative fault in an F.E.L.A. case differs from the method in Chapter 37.00 for use in cases based on Missouri law. F.E.L.A. cases are governed by federal law. Under 45 U.S.C. § 53, the *jury* diminishes damages in proportion to the employee's negligence. Under Chapter 37.00, the jury determines the total damages and plaintiff's percentage of fault but the *judge* makes the actual computation diminishing total damages to the amount recoverable by plaintiff.

(emphasis in original). MAI 8.02 and the MAI verdict forms for FELA cases provide for the jury rather than the judge to reduce the damages of the plaintiff in proportion to the plaintiff's contributory negligence because the explicit text of the statute states that this is a jury function in an FELA case.

By contrast, negligence cases under Missouri substantive law are governed by comparative fault provisions of the Uniform Comparative Fault Act (UCFA). *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983) (judicially adopting UFCA, and abolishing contributory negligence as a complete defense). Section 2 (a) of the UCFA specifically requires the *jury* to make findings as to the total amount of damages if contributory fault is disregarded, and the percentage of fault to be allocated to each party. Section 2 (c) of the UCFA then specifically requires the *court* to reduce the award of damages based on the findings made by the jury. *See* 661 S.W.2d at 38-39. The damage instructions and verdict forms in Chapter 37.00 of MAI are based on these explicit requirements.

The damage instruction and verdict form KCS submitted to trial court were based on Chapter 37.00 of MAI, and specifically directed the jury not to reduce the damages in proportion to contributory negligence. The damage instruction submitted by KCS and refused by the trial

court thus stated in part (Defendant's Instruction CC, Petition Appendix G, Petition at 37a) (emphasis supplied):

> In determining plaintiff's damages you must not reduce such damages by any percentage of fault you may assess to plaintiff. *The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.*

Similarly, the verdict form submitted by KCS and refused by the trial court (Defendant's Instruction EE, Petition Appendix H, Petition at 38a) (emphasis supplied) provided that:

> The *judge* will reduce the total amount of plaintiff's damages by and percentage of fault you assess to plaintiff.

As noted above, such a submission conflicts with the plain language of 45 U.S.C. § 53, which provides "the damages shall be diminished *by the jury* in proportion to the amount of negligence attributable to such employee." (emphasis supplied).

KCS represents to the Court that no other state or federal jurisdiction provides for the *jury* to make the reduction in damages proportionate to plaintiff's contributory negligence and return a verdict for plaintiff's net damages in an FELA case, as Missouri does. That representation is not accurate. Although the Eighth Circuit model civil instructions adopt the approach suggested by KCS, the Committee Comments specifically provide that the district court may properly choose instead to instruct in the same way as was done in this case (the jury is instructed to reduce the damages and render a net award), and recognizes that this method is supported by the explicit plain language of 45 U.S.C. § 53. See Manual of Model Civil Jury Instructions for the District Courts of

the Eighth Circuit, Committee Comments to Instruction 7.08, p. 243-44 (1999). In this regard, the Committee stated (emphasis and ellipsis in original):

> In cases in which the issue of contributory negligence has been submitted to the jury, and the jury has been instructed to make findings on the issues of contributory negligence and damages, there is a question whether the jury or the court should perform the computations which reduce the total damages by the percentage of contributory negligence found. The plain language of 45 USC § 53 (1908) is that "the damages shall be diminished *by the jury . . .* " (emphasis added.) This Committee is not aware of any case specifically prohibiting a form of verdict which allows the jury to determine the percentage of plaintiff's negligence and permits the court to perform the mathematical calculation. State jurisdictions such as Arkansas and Missouri, and some federal courts, instruct the jury to reduce the total damages awarded by the percentage of contributory negligence before rendering a general verdict for the reduced amount of total damages. *Wilson v. Burlington Northern, Inc.*, 670 F.2d 780, 782-83 n. 1 (8th Cir.), *cert. denied*, 457 U.S. 1120 (1982) (jury instructed to perform contributory negligence reduction computation and to return general verdict for damage award in reduced amount); *note* 3 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 94.18 & 94.21 (4th ed. 1987).

As the Committee Comment notes, Devitt, Blackmar & Wolff, FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 94.18 & 94.21 (4th ed. 1987), provides for the jury in an FELA case to reduce the damages in proportion to contributory negligence and render a net verdict. See also 9th Cir. Civ. Jury INSTR. 8.2.6 (1997) (jury

instructed to reduce the damages for contributory negligence, if any, in FELA cases).

Of the authorities cited by KCS in support of its representation to this Court that no other state or federal jurisdiction provides for the jury to reduce the damages in an FELA case and render a net verdict (Petition at 26), several simply do not support KCS's claim in any way. For instance, in *Janke v. Duluth & Northeastern Railroad Co.*, 489 N.W.2d 545 (Minn.App.1992), the trial court gave a damage instruction telling the *jury* to reduce plaintiff's damages in proportion to plaintiff's contributory negligence, based upon the language of 45 U.S.C. § 53. The trial court also gave the jury a special verdict form calling for a finding of total damages, and an apportionment of fault between plaintiff and defendant. The special verdict form told the jury to ignore contributory negligence in assessing damages. The judgment was reversed and remanded for a new trial on damages because the damage instruction and special verdict form were in conflict. In *St. Louis Southwestern Railway Co. v. Grider*, 900 S.W.2d 530 (Ark. 1995), plaintiff's contributory negligence was not even an issue. At most, that opinion reflected in passing how fault was apportioned between a defendant railroad in an FELA case and a third party tortfeasor joined in the case based upon state law negligence, a point that was not at issue on appeal. It did not address in any way the manner in which damages are to be reduced in an FELA case based on contributory negligence or whether the jury or the judge is to perform the reduction. On this point, *see* Arkansas Model Jury Instructions, Civil (AMI Civil 3d) 1904 and 1913 at pp. 205 and 215 (in FELA case, the jury reduces the damages and arrives at the net damages after reduction for contributory negligence).

In other cases cited by KCS, the jury found a percentage of contributory negligence but it cannot be determined from the opinion whether the jury rendered a net verdict or whether the judge reduced the damages, or it appears that jury reduced the damages and rendered a net verdict. *E.g., Topping v. CSX Transportation*, 1 F.3d 260 (4th Cir. 1993); *Wilson v. Burlington Northern Railroad Co.*, 804 F.2d 907 (10th Cir. 1986); *O'Ryan v. CSX Transportation, Inc.*, 626 N.E.2d 374 (Ill.App.1993). The issue of how the damages were to be reduced for contributory negligence was not at issue in these cases. In fact, under Illinois Pattern Instructions, the jury, and not the judge, reduces the damages in proportion to the percentage of contributory negligence attributed to plaintiff and renders a net verdict in FELA cases. IPI (Civil) 1995, 160.13. KCS cites a case from Kansas, but it appears from Pattern Instructions, Kansas, Civil 3d (PIK-Civil 3d) 132.31, that in Kansas the jury, and not the judge, reduces the damages and determines the final net damage award.

Based upon the foregoing, it is evident that it cannot be demonstrated that MAI lacks a rational basis for its differing handling of reduction of damages for contributory negligence in FELA case and reduction of damages based upon comparative fault in common law negligence cases under state law. *Burlington Northern Railroad Co. v. Ford*, 504 U.S. 648, 651 (1992). The rational basis is apparent: it is the plain language of 45 U.S.C. § 53, which differs on this point from the directives of the UCFA. KCS's equal protection argument is completely without merit.

KCS's Supremacy Clause argument must fail for the same reason. When a federal cause of action, such as an FELA case, is tried in a state court, federal law as to matters of substance controls over state procedural rules.

See St. Louis Southwestern Ry. v. Dickerson, 470 U.S. 410, 411 (1985). If the generally applied state rule is not consistent with the applicable federal law as to a matter of substance, the court must treat the federal cause of action differently than the state cause of action, by applying federal law. The Missouri Supreme Court recognizes and abides by this principle. *See, e.g., Kauzlarich v. Atchison, Topeka and Sante Fe Railway Co.*, 910 S.W.2d 254, 257-258 (Mo. banc 1995). The decisions of this Court make it clear that the division between the respective functions, roles and authority of the jury and the judge in FELA cases is a matter of substance controlled by federal law. *See, e.g., Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1957). When an FELA claim is tried in state court, the provisions of 45 U.S.C § 53 mandate that contributory negligence does not bar a recovery, but that "damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." When MAI provides that *jury*, rather than the judge, diminishes the damages, it thus conforms to the plain meaning of explicit directive in the text of the controlling federal statute that creates the cause of action. This does not violate the Supremacy Clause. To the contrary, MAI 8.02's conformity to plain language of 45 U.S.C. § 53, in providing that the reduction in damages based upon contributory negligence will be made "by the jury," illustrates its fidelity to the principles of the Supremacy Clause.

The writ should be denied.

CONCLUSION

This case is not one appropriate for review by this Court. As explained above, this Court is without jurisdiction of a number of the issues Petitioner KCS seeks to

present. In addition to these jurisdictional issues, the judgment of the Missouri Supreme Court is entirely in accord with the applicable federal statutory and constitutional law. Nothing has been shown to warrant review in this Court. For all of the foregoing reasons, it is most respectfully submitted and urged that the Petition for Writ of Certiorari to the Missouri Supreme Court be denied.

Respectfully submitted,

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937 S.W.2d 300

Missouri Court of Appeals,
Western District.

Gary [sic] V. GIDDENS, Appellant,
v.
KANSAS CITY SOUTHERN
RAILWAY COMPANY, Respondent.

No. WD 51568.
Nov. 26, 1996.
Motion for Rehearing and/or Transfer to
Supreme Court Denied Jan. 28, 1997.

Application to Transfer Denied
Feb. 25, 1997.

Patrick O'Brien, St. Louis, for appellant.

Harland Burkhead, Kansas City, for respondent.

HANNA, Presiding Judge.

Plaintiff, Garry V. Giddens, brought this cause of action, premised upon the Federal Employer's Liability Act, *45 U.S.C. § 51 et seq.*, for injuries he sustained on May 18, 1989, while working for the defendant as a maintenance-of-way foreman. He appeals from the Circuit Court's order granting defendant Kansas City Southern Railway Company's Motion for New Trial.

On May 17, 1989, the plaintiff was dispatched to check a railroad track for water damage due to heavy rains, which had washed away the roadbed. On May 18, 1989, he was again called to assess further damage along the right of way. On May 19, 1989, the plaintiff was instructed to take his crew to milepost 612 to repair the washout by building a box bridge structure under the rails to hold them up. He was told to use the crane and

caboose chains to lift the rails while the box bridge was being built.

Upon arriving at milepost 612, the plaintiff was instructed to supervise a backhoe operator and to place the washed out mud and rock back into the washout. The plaintiff and the crew were then to use the locomotive crane to raise the tracks and place ties on top of the mud and rock to support the track.

While repairing the tracks, the plaintiff was under a raised rail assisting in placing ties to shim up the rail. Because of the slope of the fill material, the plaintiff had to prop himself up with his left hand while he guided the ties in with his right hand. While the rails and ties were in mid-air, the chain broke and they fell on the plaintiff's left hand. It took approximately six minutes to remove the track and ties from the plaintiff's hand.

The plaintiff sought emergency treatment and spent the weekend in the hospital. The following Monday, the plaintiff went to see a physician, selected by the defendant, who specialized in the treatment of hands. Between 1989 and 1992, the plaintiff underwent seven surgical procedures, primarily on the long and ring fingers, to restore function to his left hand.

The plaintiff received treatment and did not work from the time of the accident until June 1990. He then worked until December 1990, at which time he took off until May 1991 for further treatment. He then returned to work until December 1991. He did not work for the railroad thereafter.

In February 1992, a company doctor examined the plaintiff for fitness for duty and medically disqualified him from performing his previous job on the railroad. In September 1992, the surgeon who operated on the plaintiff's hand advised the defendant's Division Engineer that the plaintiff was restricted from lifting anything over ten pounds with his left hand and was prohibited from using vibrating tools and sledge hammer.

The defendant had the plaintiff undergo a field test, which he was unable to successfully complete. Plaintiff was taken off the payroll on October 31, 1992, and was not offered another position.

Between the time of the original accident in 1989 and the plaintiff's last absence in October 1992, he received his regular wages under the defendant's wage continuation program, and he continued to accrue credited months towards eligibility for the Railroad Retirement Board disability pension. The first point on appeal concerns the admission of the plaintiff's benefit payments under the Railroad Retirement Act[1].

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[1] The Railroad Retirement Board annuities are funded partially by the employer and partially by the employee. Under Tier Two, the employee pays 4.9 percent on his first $45,000 of earnings and the employer pays 16.1 percent. Contributions to the fund by both parties are mandatory. After 20 years of credited service with the defendant, the employee qualifies for a disability pension. The employee is limited to $400 per month outside earnings; any earnings in excess decrease his $1,500 monthly pension dollar for dollar.

When the case was first tried, the jury returned a verdict of $500,000. The trial court sustained the defendant's motion for new trial on the ground that a mitigation instruction was not given. No appeal was taken. The case was retried, and the jury returned a verdict in the amount of $1,400,000 for the plaintiff. The court sustained the defendant's motion for new trial on two grounds, which now have been briefed on appeal.

Defense counsel sought to introduce evidence of the plaintiff's disability payments. The trial court refused to allow the plaintiff to be questioned about his pension proceeds because it violated *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963). In the defendant's motion for new trial, defendant challenged the trial court's decision to exclude, from the jury's consideration, the fact that the plaintiff had been receiving, and would continue to receive, disability benefits. The trial court reversed its decision excluding the evidence, believing *Moore v. Missouri Pac. R.R. Co.*, 825 S.W.2d 839 (Mo. banc 1992) to be the controlling case law.

The defendant maintains that the benefits paid by the Railroad Retirement Board were not a "collateral source" payment but were relevant to plaintiff's ability and incentive to work and to his obligation to mitigate damages. Further, the defendant argues that even if the evidence is generally excludable, the plaintiff had "opened the door" to its admission. Specifically, the defendant contends that the plaintiff's vocational rehabilitation expert, Dr. Samuel Bernstein, invited introduction of the evidence when he testified that the plaintiff was well-motivated to work. Plaintiff maintains that the evidence of his benefits was

not admissible under any set of facts because they constituted collateral source evidence.

On a motion for new trial, a trial court may reconsider its rulings on discretionary matters and may order a new trial if the court believes its discretion was not wisely exercised and that the losing party was thereby prejudiced. *State ex rel. Missouri Highway and Transp. Comm'n v. Pedroley*, 873 S.W.2d 949, 953 (Mo.App.1994). While appellate courts are more liberal in upholding the grant of a new trial than in denying it, the error complained of still must be prejudicial to the party seeking the new trial. *VonSande v. VonSande*, 858 S.W.2d 233, 236 (Mo.App.1993). The error complained of here is that the evidence which was excluded would have been used to rebut Dr. Berstein's testimony.

However, the discretion accorded the trial court in granting a motion for new trial presupposes a determination of fact, not law. *Highfill v. Brown*, 340 S.W.2d 656, 664 (Mo.1960). The trial court must not only be dissatisfied with the verdict, but there must be some compelling reason to warrant its dissatisfaction. *Van Loon v. St. Joseph Ry., Light, Heat & Power Co.*, 271 Mo. 209, 195 S.W. 737 (1917). The trial court's discretion may not declare incompetent evidence to be admissible or competent evidence to be inadmissible.

Eichel v. New York Cent. R.R. Co., 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963), is the seminal case on the issue of the admissibility of disability payments. In *Eichel*, the Supreme Court held that evidence of the plaintiff's receipt of disability pension payments under the Railroad

Retirement Act should not have been received into evidence. *Id.*, 375 U.S. at 254-55, 84 S.Ct. at 317. In so finding, the Court stated:

> At the trial, counsel for respondent argued that the pension would show "a motive for [petitioner's] not continuing work, and for his deciding not to continue going back to work after the last accident." On the basis of this argument the Court of Appeals concluded that the disputed evidence should have been admitted because: "Its substantial probative value cannot reasonably be said to be outweighed by the risk that it will . . . create substantial danger of undue prejudice through being considered by the jury for the incompetent purpose of a set-off against lost earnings." We disagree. In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension.
>
> *Id.* (footnote omitted).

Eichel instructs that the relevancy of the evidence is not the key issue but rather that it is the balancing of unduly prejudicial evidence against its probative value. The court came down on the side of the potential harm that may be caused by the introduction of this evidence outweighing its probative value. The court held it is improper for disability pension benefits to be considered by the jury in assessing mitigation of damages or to show malingering. In *Moore v. Missouri Pac. R.R. Co.*, 825 S.W.2d

839, 842 (Mo. banc 1992), the court acknowledged and followed the principle of *Eichel*.

The defendant maintains that the rule set forth in *Eichel* is not absolute and that Dr. Bernstein's testimony opened the door to rebuttal evidence of the plaintiff's pension benefits. At trial, Dr. Bernstein was asked what recommendations he had for vocational retraining or rehabilitation of the plaintiff. He stated:

> *I felt [the plaintiff] was well motivated.* That's number one. Motivation is not a problem, as I saw it, in this particular case.
>
> * * * * * *
>
> First, he can't go back and do what he did. That's just that. *Secondly, the man wants to do something with his life. He's interested in working.*
>
> * * * * * *
>
> Because I felt that he was *motivated and because he's motivated,* I want to encourage him to go – I told him to look.

The trial court held in its order granting the defendant's motion for new trial that Dr. Bernstein's testimony opened the door to evidence of the disability payments. Specifically, the trial court stated:

> [T]he disability payments create a reason for plaintiff not to secure employment. Plaintiff receives $1500 per month in disability payments. If he earns more than $400 per month the disability payment is correspondingly reduced . . . . Not working for that amount allowed him to create the impression before this jury that he had no income. This no doubt encouraged the jury to award him substantial damages. . . .

Some limited evidence about the disability payments should have been admitted to challenge Dr. Bernstein's comments about motivation.

The plaintiff first argues that a witness for the plaintiff cannot open the door, claiming that only the plaintiff, and he alone, can raise the issue of hardship or financial distress to permit introduction of the evidence of plaintiff's retirement benefits. We have not located any authority that suggests such a requirement. The plaintiff relies primarily on *Moore v. Missouri Pac. R.R. Co.* for this argument. Contrary to his assertion, *Moore* does not restrict the introduction of the rebuttal evidence to those times when the plaintiff himself raises the issue of his dire financial condition. The court in *Moore* observed that "[t]here is no functional distinction between the plaintiff injecting his dire financial condition on direct examination or on cross-examination." *Moore*, 825 S.W.2d at 842. Actually, *Moore* expanded the admissibility of the rebuttal evidence to the situation when the plaintiff opens the door by testifying to his dire financial condition on cross-examination. *Id.* at 842-43. Importantly, the court stated that "it is the raising of plaintiff's financial condition with the jury" that permits the defendant to rebut with evidence of other financial assistance available to the plaintiff, irrespective of whether the evidence is injected purposefully or through inadvertence. *Id.* at 843. The plaintiff therefore cannot circumvent the rule by offering testimony of his financial hardship through an expert instead of by his own testimony. We are not persuaded that only the plaintiff himself may open the door to this rebuttal evidence. The plaintiff invites such evidence if his expert witness testifies to plaintiff's financial distress.

The admission of the disability and retirement benefits is dependent on the direct testimony of plaintiff's adverse financial condition and not upon which witness offers the testimony.

The defendant correctly argues that there are exceptions to the rule set forth in *Eichel*. *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483-84 (3rd Cir.1967), *cert. denied*, 390 U.S. 1013, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968), and *Lange v. Missouri Pac. R.R. Co.*, 703 F.2d 322, 324 (8th Cir.1983), both determined that an exception to *Eichel*'s general rule of inadmissibility existed in those situations where the plaintiff injects his financial condition into the lawsuit. In *Gladden*, the plaintiff testified that "my bills got behind and when I went back to work, that was one of the main reasons I went back to work, was to try to catch my bills up and support my family." *Gladden*, 385 F.2d at 482. The court found that the defendant was not required to leave this testimony unchallenged. *Id.* at 483-84. Likewise in *Lange*, the court permitted the defendant to rebut the plaintiff's testimony that he had to return to work immediately after back surgery because he had no savings or disability income with evidence that he had settled a workers' compensation claim for a lump sum payment. *Lange*, 703 F.2d at 323-24.

In *Moore v. Missouri Pac. R.R. Co.*, 825 S.W.2d 839, 842 (Mo. banc 1992), the Missouri Supreme Court relied on *Gladden* and *Lange* in recognizing an exception to *Eichel*"s general rule of inadmissibility. In *Moore*, the plaintiff testified on cross-examination that he could not go back to a therapist because he could not afford it. *Id.* at 842. The court therefore permitted the defendant to challenge

this testimony by inquiring about the plaintiff's collateral source payments. *Id.*

If the plaintiff injects his financial condition into the proceedings and implies financial distress, the defendant may challenge this evidence by showing that the plaintiff had financial assistance available. *Moore*, 825 S.W.2d at 843. Here, Dr. Bernstein testified about the plaintiff's motivation to work. The plaintiff's evidence here was not similar to Moore's testimony that he could not continue his therapy because he could not afford it, *id.* at 842, or an employee claiming he was forced to return to work immediately after surgery because he had no money, *Lange*, 703 F.2d at 323-24, or the employee's testimony that he was behind in his bills and had to go back to work to catch up on his bills and support his family, *Gladden*, 385 F.2d at 482. In these cases, the plaintiff's evidence directly injected the financial situation into the case, thereby allowing the admission of collateral source evidence to challenge it. The plaintiff's evidence here did not suggest financial distress for the purpose of appealing for jury sympathy or to increase the jury's award of damages. See *Mateer v. Union Pac. Sys.*, 873 S.W.2d 239, 245 (Mo.App.1993). In fact, being well motivated to work falls far short of the mark of the requirements of *Moore* that there be evidence of plaintiff's financial state designed to evoke sympathy from the jury. See *Moore*, 825 S.W.2d at 843. The trial court properly excluded the evidence, and its exclusion cannot be a point of error on which to grant a new trial.

The trial court granted the defendant a new trial on the alternative ground that plaintiff's closing argument was improper. The plaintiff raises a number of points in

defense of his closing argument. First, he maintains that the defendant failed to object to the alleged improper arguments as a choice of trial strategy and should not be allowed plain error review. He also contends that the trial court held, in its order granting a new trial, that the jury award was not excessive, thereby negating any basis for the new trial. Finally, he contends that his closing argument consisted of proper comments on the evidence or permissible inferences drawn from the evidence and fair retorts to contentions made by the defendant.

In his motion for new trial, the defendant claimed that plaintiff's closing argument violated Rules 3.3 and 3.4 of the Missouri Rules of Professional Conduct and the trial court's rulings on defendant's pretrial motions in limine, which dealt with the Americans With Disabilities Act and the discharge and accommodations of the plaintiff. The defendant contended that these violations incited the bias and prejudice of the jury as evidenced by the excessive damage award to the plaintiff.

Although the defendant failed to object to the plaintiff's closing argument, the point of error was preserved in its motion for new trial. Following arguments, the trial court ordered a new trial on this alternative point, stating:

> Defendant is also entitled to a new trial due to the closing argument of plaintiff. That argument taken as a whole exceeds the bounds of propriety. It attacks opposing counsel and suggests he has no interest in the truth. It improperly suggests that the plaintiff risked being fired for completing the washout repair in another way. It discusses kicking plaintiff off the railroad to

> create animosity toward the defendant. The argument is designed to inflame the jury. Apparently, it worked. Within one hour the jury returned a 1.4 million dollar verdict without requesting any of the exhibits.

Plaintiff directs our first inquiry to defense counsel's failure to object. Plaintiff properly points out that an objection would have permitted the trial court to take corrective action by its ruling, instructions to counsel or the jury, or both. Further, he contends, an objection and the court's ruling would have allowed him to correct his argument. Plaintiff's argument is not without merit. It points out the significance of timely objections as well as the hazards of plain error review. We are certain that these factors were not lost on the trial court which considered them, among others, when it decided the motion pursuant to the plain error rule. While the plaintiff's contention must be given serious consideration by the trial court, we are presented with another, equally sound proposition of law, which is that each case must be decided on its own facts. The motion for new trial enables the trial court to consider its rulings in a more reflective atmosphere. *Farley v. Johnny Londoff Chevrolet, Inc.*, 673 S.W.2d 800, 804 (Mo.App.1984).

Further, Rule 78.08 permits the trial court to review post trial matters, which affect substantial rights, pursuant to plain error, when the court finds that a manifest injustice or miscarriage of justice has resulted. The review is accomplished by the trial judge, who occupies a far better position than this court to fairly determine the effects of unobjected argument, evidence, or court instructions on the jury's verdict.

There is ample authority for the trial court to grant a new trial because of counsel's improper argument even though there was no objection to the argument. In *Greenwell v. Huffman*, 506 S.W.2d 28, 31 (Mo.App.1974)(citing *Robbins v. Brown-Strauss Corp.*, 363 Mo. 1157, 257 S.W.2d 643 (1953)), the court stated:

> The trial judge was in an excellent position to gauge the effect of the improper and objectionable argument, and, if he deemed the overall effect to have been so prejudicial as to deprive plaintiff of a fair and impartial trial as he undoubtedly did, he had the duty to cause the entry of the new trial order, although no objection had been made to such argument.

Id. at 31 (emphasis in original) (*Robbins*, 257 S.W.2d at 648). See also *Beer v. Martel*, 332 Mo. 53, 55 S.W.2d 482, 484 (1932). Our case law holds that, not only does the trial court have the authority to grant a new trial, it has the duty to do so when the effect of the argument was so prejudicial that a party did not receive a fair trial. This points out a meaningful distinction between the denial and grant of a new trial. "On appeal, when a party claims error because the trial court denied him a new trial, the party ordinarily must have made a proper and timely objection to the claimed error to preserve it for review. . . . " *Farley v. Johnny Londoff Chevrolet, Inc.*, 673 S.W.2d 800, 804 (Mo.App.1984). When a party claims error, as here, because the trial court granted the opposing party a new trial, the opposing party need not have made an objection to the error upon which the trial court granted a new trial. *Id.* We defer to the trial court's discretion granted in Rule 78.08 to review for plain error affecting substantial rights.

Next, the plaintiff contends that the trial court held the verdict not to be excessive and this showed that the jury was not moved by bias, passion or prejudice. The plaintiff asserts that the trial court's express finding that the jury verdict of $1.4 million was not excessive is inconsistent with a finding of prejudice. In support of his argument, the plaintiff cites to both a passage in the trial court's order granting the defendant's motion for new trial, wherein the court acknowledged that the plaintiff was severely injured, and the court's cover letter accompanying the order, wherein the court stated that there was no doubt that a jury would return a substantial verdict each time the case was tried.

A trial court's ruling on a motion for a new trial is not required to set forth its reasons for the conclusion reached or the mental process by which the determination was made, *Resco Constr. Co. v. Dawson Cabinet Co.*, 656 S.W.2d 324, 326-27 (Mo.App.1983), and in those cases when it does, its efforts should be considered as no more than an attempt to explain the order to the parties and their attorneys. Even in those cases where the court's reasons or observations may appear inconsistent with its ruling, the decision is conclusively presumed to have been made on the ground stated in the order. *Id.*

In *Bierman v. Langston*, 304 S.W.2d 865, 867 (Mo.1957), the order granting a new trial because of an excessive verdict was unambiguous, but the memorandum accompanying the order stated a legal and non-discretionary ground. The two reasons were at variance with each other. The court held that the order allowing a new trial was the only official repository for the court's grounds or for reasons for sustaining a motion for new trial, and that,

in those situations where the order is unambiguous and the memorandum countervails or disputes the order, the memorandum does not constitute a substitute for the order. *Id.*

An observation that plaintiff was severely injured and that a jury will return a substantial verdict in another trial are not necessarily inconsistent with a ruling that the verdict is excessive. These remarks explained to the parties and their attorneys that a jury verdict less than $1,400,000 would still be substantial for the injuries that the plaintiff sustained. A trial court's explanation for its ruling is a practice which should not be discouraged. However, the trial court's comments, obviously designed to provide an explanation, cannot be used to misconstrue its order.

However, whether the verdict was excessive is not necessarily a controlling factor in determining whether the closing argument was prejudicial. In *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 16-17 (Mo. banc 1994), the trial court allowed plaintiff to argue a specific dollar figure for damages for the first time in the final portion of his closing argument although no damage figure was mentioned in the initial part of his argument. Judge Thomas, writing for a majority of the court, overruled prior case law that held that the error was prejudicial only if the damages were excessive. *Id.* at 21-22. The court noted that the verdict of $2,850,000.00, even considering the plaintiff's serious injuries, was very substantial and that it was more reasonable to assume that the improper argument contributed to an increase in the damages rather than to assume the contrary, even though the increased verdict may not be excessive. *Id.* at 22. However, it is usually

impossible to determine whether or how much such an erroneous argument may have contributed to the verdict. *Id.* at 21. The court adopted the rule derived from *Lester v. Sayles,* 850 S.W.2d 858 (Mo. banc 1993), "that the party responsible for error relating to argument on the issue of damages is charged with a rebuttable presumption that the error was prejudicial." *Id.* at 22. The holding places upon the party who committed the error the responsibility for rebutting the error's prejudicial effect, irrespective of the size of the verdict.

The plaintiff's final position is that there was no impropriety in his closing arguments. The plaintiff argues that his closing argument was based upon permissible inferences reasonably drawn from the evidence and was a fair retort to arguments asserted by the defendant. In evaluating the plaintiff's claims, we are cognizant of the fact that the trial court is in the best position to appraise the consequence of closing argument and that the appellate court may intervene only if it concludes that the trial court abused that discretion. *Hammer v. Waterhouse,* 895 S.W.2d 95, 105 (Mo.App. 1995).

The trial court made its decision based on the overall tenor of plaintiff's closing argument. The court noted examples wherein the plaintiff's counsel attacked opposing counsel by suggesting that he "had no interest in the truth," where he improperly suggested that the plaintiff risked being fired for not repairing the washed out track bed in the way suggested by the defendant, and where he made an unjustifiable argument about the plaintiff's termination with the purpose of creating animosity toward the defendant. The court characterized the plaintiff's argument as designed to inflame the passions of the jury.

The parties argue back and forth on this issue, placing their own spin on their respective positions as to each other's understanding of the argument: why the argument was based on the evidence, whether it was a fair retort, and why it was no more or less than a malicious attack on the defendant or its attorney. The plaintiff casts his argument in neutral terms to suggest that there was no intent to inflame the jury. On the other hand, the defendant maintains that the plaintiff's only purpose was to incite jury passion and bias.

The argument by plaintiff's counsel did make repeated references to opposing counsel, including that: (1) all of the defendant's safety rules which had been marked and placed in evidence were now opposing counsel's rules and that opposing counsel decided they had been violated; and (2) that opposing counsel circumvented the truth when trying to explain away plaintiff's argument. Plaintiff's counsel also made references to the defendant that included: (1) that if an employee got hurt at this company, its defense is that he broke a safety rule, and if he can't work, the company will fire him and the employee should not look to it for compensation; (2) that the company "could care less" about safety; and (3) a personal opinion on the credibility of one of the defendant's witnesses. Plaintiff's counsel then stated the following:

> I think there is a real strong inference here that the railroad wanted to avoid the whole medical question and stage this field test, brought him back, failed him so they could run him right off the railroad. They're tired of paying his wage continuation. They're tired of paying them. If

> we can get rid of this guy who, for 20 years gave us the sweat off his brow and didn't give them a moment's problem. . . . He wasn't good enough for Kansas City Southern anymore. They got rid of him. They didn't accommodate him like people are accommodated on other jobs with disability.

We believe that the trial judge was justified in its determination that plaintiff's closing argument was unwarranted, untrue, and that the contentions noted above were not fair retorts, fair comments on the evidence, or reasonable inferences to be drawn therefrom. These remarks were not on the merits of the case, but rather were an attempt to inject hatred and prejudice against opposing counsel and his client. Reckless assertions by counsel, unwarranted by proof and intended to arouse hatred or prejudice, are condemned as tending to cause a miscarriage of justice. *Critcher v. Rudy Fick, Inc.*, 315 S.W.2d 421, 427 (Mo.1958). A charge against opposing counsel is to be decried. See *Tucker v. Kansas City S. Ry. Co.*, 765 S.W.2d 308, 311 (Mo.App.1988).

We are mindful that counsel is afforded wide latitude to argue the evidence and inferences drawn from the evidence. "[T]he law indulges a liberal attitude toward argument, particularly where the comment complained of is fair retort or responds to prior argument of opposing counsel." *Keith v. Burlington N. R.R. Co.*, 889 S.W.2d 911, 915-16 (Mo.App.1994). However, a vigorous closing argument must be directed to the facts, to the reasonable inferences drawn therefrom, to fair retort to opposing counsel's argument, and to the law as applied to the evidence.

The determination as to whether a new trial is warranted because of jury argument rests within the trial court's sound discretion. *Cook v. Cox*, 478 S.W.2d 678, 682 (Mo.1972). Appellate review of such discretion is limited to a determination of whether there has been an abuse of that discretion. *Id.* Deference is given to the better position of the trial judge to evaluate the prejudicial effect of the overall tenor of the closing argument. The trial judge heard the closing argument here and viewed it in its entirety. The court concluded that the argument's purpose was to inject matters of an inflammatory nature before the jury. The trial court's award of a new trial because of unwarranted and unjustified argument, was not an abuse of discretion.

The defendant has raised other issues, which are moot and we trust will be resolved on retrial.

Order granting a new trial is affirmed.

SMART and EDWIN H. SMITH, JJ., concur.

45 U.S.C. § 53

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

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45 U.S.C. § 55

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it

has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

(Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.)

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Petitioner,

v.

GARRY V. GIDDENS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad

[1] The letter expressing consent has been filed with the Clerk of the Court.

industry as a whole—and in those instances such requests have been granted.[2]

In this case, the court below followed several other lower courts in attributing to a prior decision of this Court a hard and fast rule prohibiting any mention of the fact that a railroad employee seeking compensation under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, is already receiving a substantial disability benefit under the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. §§231-231u. As a result of this and like rulings in other jurisdictions, a FELA jury may not consider the impact receipt of these benefits may have on the plaintiff's motivation to return to work or take them into account when deliberating on a damages award. The inability to offer evidence, highly relevant and probative to the plaintiff's allegation of a permanent work-related disability, greatly disadvantaged petitioner in this FELA case, as it has numerous other railroads in other cases over the years. This rule, which traces its origins to nothing more than dicta by this Court, confers an enormous and unwarranted disadvantage on railroad defendants in numerous cases arising under FELA.

When AAR participates in a case like this one as *amicus curiae,* it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA and other statutes, like the RRA, that have been enacted to apply uniquely to railroads. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of nearly 1000 attorneys representing railroads

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[2] *E.g., Consolidated Rail Corp. v. Wicker,* 119 S.Ct. 530 (1998); *CSX Transp., Inc. v. Sirbaugh,* 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. v. Chittum,* 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley,* 117 S.Ct. 379-80 (1996). All granting motion of AAR to participate as *amicus curiae.*

nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the two federal railroad statutes involved in this case, and the impact of the lower court's ruling on railroads nationwide. (While AAR agrees with petitioner's position that use of a special Missouri verdict form for FELA cases raises important constitutional issues, it is limiting its brief to the issue of the admissibility of Railroad Retirement disability benefits, as the former issue appears limited to cases tried in one state.)

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling, by bringing the perspective of an entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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March 9, 2001

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues and employ 90 percent of rail workers. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

One such matter is the Federal Employers' Liability Act (FELA). 45 U.S.C. §§51-60. In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted this tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law to cover employees within their jurisdiction. Under these laws, the concept of assigning fault for workplace injuries has been abandoned in favor of the principle that all employees suffering work-related injuries are deserving of compensation. Today, the railroad industry remains virtually the only one where work-related injuries are compensated under a fault-based system.[2] A key difference between the workers' compensation systems and FELA is that the former cap the employers' liability, but the latter does not.[3]

Each year, thousands of claims and lawsuits are asserted under FELA against AAR members and other railroads.[4] In

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[2] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[3] "[T]he amount of compensation for disability depends on the workers' previous earning level, for most acts award a percentage of average wage, somewhere between a half and two-thirds. But practically all acts also set a maximum in terms of dollars per week . . ." 1 A. LARSON & K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.03[5] (2000 ed.). "It was never intended that compensation payments [under workers' compensation] should equal actual loss, if for no other reason than that such a scale would encourage malingering." *Id.* On the other hand, a compensatory damages award under FELA will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

[4] In 1999, 4,970 FELA lawsuits were filed. ASSOCIATION OF AMERICAN RAILROADS, 1999 CLAIM & LITIGATION REPORT 3-3 (2000). Because FELA awards for pecuniary losses are not capped, and because there is a potential for the awarding of substantial noneconomic damages,

many cases, as did respondent in this case, the injured employee alleges a permanent disability and seeks compensation covering lost wages for the remainder of his or her projected work life. Because of the open-ended nature of damages available under FELA, awards in these cases can be substantial. In this case, it exceeded $1.5 million.

In addition to being afforded unique treatment through coverage under FELA, railroads and their employees are covered by the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. §§231-231u, another system designed exclusively for the railroad industry. Among the benefits provided under this statute are disability annuities, available to employees who qualify on the basis of age and/or years of service.[5] Depending on the nature of the disability suffered, rail employees may qualify for one of two kinds of disability benefits. Employees who are unable to work at any regular employment may qualify for total and permanent disability benefits.[6] Even if not qualified for total and permanent disability benefits, employees who are disabled from working in their regular occupation on the railroad may qualify for an occupational disability benefit.[7] This special benefit, the kind which was received by respondent, is not available to workers covered by Social Security.

FELA is more costly than the workers' compensation systems. *See* Transportation Research Board, *Special Report No. 241: Compensating Injured Railroad Workers Under the Federal Employers' Liability Act* 163-64 (1994). In 1999, the railroad industry spent about $850 million in payment and administration of FELA claims and lawsuits. CLAIM & LITIGATION REPORT at 2-7.

[5] 45 U.S.C. § 231a.

[6] 45 U.S.C. § 231a(a)(1)(v). To qualify for a total and permanent disability annuity an employee must have at least ten years of service.

[7] 45 U.S.C. § 231a(a)(1)(iv). To qualify for an occupational disability annuity an employee must have either twenty years of service, or must be 60 years old with ten years of service.

A significant number of railroad employees receive RRA disability benefits. In fiscal year 1999, 5,100 disability annuities were awarded to railroad workers, of which 4,000 were for occupational disability.[8] During that period, the average monthly occupational disability benefit awarded was $1,912; the average monthly total and permanent disability benefit awarded was $1,176.[9] As of September 30, 1999, disability annuities were being paid to about 80,000 former railroad workers, about three-quarters of which were occupational disability annuities.[10] These individuals received over $1.3 billion in disability benefits in fiscal 1999, the majority of which, $1.130 billion, went to occupational disability annuitants.[11]

This case is representative of an all too common situation where, in addition to obtaining a large FELA award, the plaintiff also received, and will continue to receive, a substantial occupational disability benefit. A railroad employee may qualify for a disability benefit regardless of whether the disability resulted from a work-related injury also covered by FELA, or some other cause. Therefore, employees claiming to have been injured on the job may, if they

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[8] U.S. Railroad Retirement Board, 2000 Annual Report 18 (2000) ["RRB Annual Report"]. The overwhelming majority of occupational disability applicants are granted awards by the Railroad Retirement Board: in 2000, about 98% of the applications were granted. *See* Letters from Catherine A. Leyser, Director of Assessment and Training, Railroad Retirement Board to Laura Welch, M.D. and Dennis Richling, M.D. (containing RRB Office of Programs Assessment and Training Monthly Updates for calendar year 2000). Thus, employees who claim to be unable to work in their previous occupation, including those who allege the cause as being a work-related injury, are virtually assured of receiving a disability benefit.

[9] RRB Annual Report at 18.

[10] *Id.* at 19.

[11] *Id.*

meet the eligibility requirements, collect disability benefits and, at the same time, pursue a remedy under FELA for the same injury. The awarding of a FELA settlement or judgment does not terminate Railroad Retirement disability payments (however, return to gainful employment would. 45 U.S.C. § 231a(e)(4)). Thus, FELA and the Railroad Retirement System often provide an employee with two sources of benefits for the same loss.

Both FELA and the Railroad Retirement System are supported by huge infusions of funds from the railroad industry through a tax on payroll. The underlying purpose of both systems is laudable and not in question. However, court-made rules which require a railroad employer to pay twice, by funding benefits under both systems for the same purpose, should be scrutinized because such rules impose an unwarranted and unfair financial burden on a sector of the economy without advancing the purpose of either FELA or the RRA. AAR members, therefore, have a strong interest in seeking review of court decisions, like the ruling below, which perpetuate such an outcome.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in petitioner's brief.

SUMMARY OF THE ARGUMENT

Nearly four decades ago, in a case where the issue was not raised by the parties, this Court opined that a FELA plaintiff's receipt of occupational disability benefits under the RRA may not be used to mitigate damages for lost earnings. This Court went on to rule that the prejudicial effect of introducing such evidence for the purpose of calling into question the plaintiff's motivation to return to work outweighed its probative value, affirming a judgment originally made by the trial court in that case. Since that time, virtually all courts hearing FELA cases, including the court below, have felt

constrained to adhere to a *per se* rule of inadmissibility of evidence of receipt of RRA disability benefits, preserving windfall double recoveries for FELA plaintiffs.

Though these rulings purport to be based on the traditional collateral source rule, the rationale for that rule does not apply with respect to RRA occupational disability benefits. The collateral source rule applies where the source of the plaintiff's other compensation is wholly independent of the tortfeasor. However, railroad companies fund the lion's share of the occupational disability program, and thus are being made to pay twice to compensate employees for the same disability, resulting in a multimillion dollar financial liability.

In lawsuits outside of the FELA context, courts have permitted offsets where the defendant was the source of additional payments to the plaintiff, including where the additional payments were made pursuant to a government program like Social Security. Following this approach in FELA cases, by permitting introduction of evidence that the plaintiff is eligible for RRA occupational disability benefits, would be consistent with FELA's purpose, which is to make the injured employee whole, but not to employ special rules which unduly inflate damages awards.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE AS HAVE SEVERAL OTHER LOWER COURTS IT MIS-INTERPRETS AN IMPORTANT ASPECT OF THE FELA

A. Lower Courts Have Relied On Dicta In This Court's *Eichel* Decision To Improperly Exclude Relevant Evidence And Require Railroads To Fund A Double Recovery For Many FELA Plaintiffs

Thirty-five years ago, in *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), a case brought under FELA, this Court simply acknowledged that the defendant railroad had not asserted that it should be permitted to introduce evidence that the plaintiff was receiving RRA disability benefits in order to mitigate the damages for which the defendant might be liable.[12] This dicta has taken on a life of its own, and in the ensuing years "[c]ourts have consistently interpreted *Eichel* to preclude admission of evidence of collateral benefits whether such evidence is presented during the liability or damages phase of the trial", *Sheehy v. Southern Pac. Transp. Co.*, 631 F.2d 649, 651-52 (9th Cir. 1980).[13] As a result, millions of

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[12] "Respondent does not dispute that it would be highly improper for the disability pension to be considered in mitigation of the damages suffered by petitioner." 375 U.S. at 254. Instead, the defendant railroad argued only that evidence of receipt of railroad retirement benefits should be admitted to show malingering by the plaintiff.

[13] *E.g., Green v. Denver & Rio Grande Western R.R.*, 59 F.3d 1029 (10th Cir. 1995); *Wilcox v. Clinchfield R.R.* 747 F.2d 1059 (6th Cir. 1984); *Sheehy v. Southern Pac. Transp. Co.*, 631 F.2d 649 (9th Cir. 1980); *Fuhrman v. Reading Co.*, 439 F.2d 10 (3rd. Cir. 1971); *Caughman v. Washington Terminal Co.*, 345 F.2d 434 (D.C. Cir. 1965); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820 (5th Cir. 1965). In *Green*, the Tenth Circuit insisted that the reference in *Eichel* to the inadmissibility of

dollars in windfall has accrued to FELA plaintiffs at the expense of the nation's railroads.

As it frequently does in FELA litigation, this Court's *Eichel* decision played a significant role in the case below. The petitioner sought to introduce evidence that respondent was receiving an $18,000 annual RRA disability pension, as a fact which the jury might deem relevant in assessing respondent's motivation to return to work. The trial court ultimately found in petitioner's favor on this issue, but was reversed by the state appellate court.[14] Citing *Eichel*, the Missouri Supreme Court stated that "evidence of a plaintiff's receipt of disability pension payments under the Railroad Retirement Act is inadmissible at trial under the 'collateral source doctrine' . . ." *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 824 (Mo. 2000). Similarly, in an earlier stage in the appeal, the Missouri Court of Appeals stated that *Eichel* "held it is improper for disability pension benefits to be considered by the jury in assessing mitigation of damages or to show malingering." *Giddens v. Kansas City Southern Ry. Co.*, 937 S.W.2d 300, 304 (Mo. App. 1996).[15]

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disability benefits to mitigate damages was "necessary to the holding." 59 F.3d at 1033. Regardless of how this aspect of the *Eichel* opinion is characterized, it is clear that the railroad had not contended the evidence could be considered in mitigation of damages: thus, as it was not an issue in controversy, it is unlikely this Court ever had the benefit of briefs and arguments on the question.

[14] The trial court first disallowed the plaintiff to be questioned about his disability pension, but subsequently granted a new trial, finding, among other things, it had incorrectly ruled on this issue.

[15] Citing *Moore v. Missouri Pac. R.R.*, 825 S.W.2d 839 (Mo. Banc 1992), the Court of Appeals acknowledged that such evidence may be admitted if the plaintiff injects his financial condition into the case, but held that here the plaintiff did not do so. 937 S.W.2d at 305. The Missouri Supreme Court subsequently ruled that petitioner was precluded from raising that issue by the "law of the case doctrine." 29 S.W. 3d at 824.

As in the case below, *Eichel* typically is read to require a *per se* rule of inadmissibly of what is often a relevant and probative piece of evidence in FELA cases, i.e., that the plaintiff is already receiving, and will continue to receive, a substantial payment directly related to the disability for which compensation is sought from the railroad.[16] Courts accept as gospel that the prejudicial effect of such evidence always outweighs its probative value.[17]

This result which lower courts attribute with consistency to *Eichel*—that the jury must remain ignorant of the plaintiff's eligibility for a RRA disability pension—is neither called for by FELA nor consistent with the common law collateral source rule upon which the "*Eichel* rule" is premised. Moreover, it turns a blind eye to the broad discretion typically afforded trial judges in admitting relevant evidence under the Federal Rules of Evidence.[18] Nonetheless, when confronted with attempts by FELA defendants to introduce evidence of the plaintiff's receipt of disability benefits, most court feel constrained by *Eichel* from undertaking an analysis of the purpose of the collateral source rule and the nature of the

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[16] "*Eichel* instructs that the relevancy of the evidence is not the key issue but rather it is the balancing of unduly prejudicial evidence against its probative value. The [Supreme] court came down on the side of the potential harm that may be caused by the introduction of this evidence outweighing its probative value." *Giddens*, 937 S.W. 2d at 304.

[17] Courts seem willing only to go so far as to admit evidence of RRA disability benefits only where plaintiff has injected the issue of his financial condition into the case. *Moses v. Union Pac. R.R.*, 64 F.3d 413 (8th Cir. 1995); *Lange v. Missouri Pac. R.R.*, 703 F.2d 322 (8th Cir. 1983); *Gladden v. Henderson & Co.*, 385 F.2d 480 (3rd Cir. 1967).

[18] *See* Fed. R. Evid. 403. Appellate courts grant broad leeway to trial courts in ruling on the admissibility of evidence under Rule 403, "and will reverse only if the court committed a clear abuse of discretion." *United States v. Mitchell*, 31 F.2d 628, 631 (8th Cir. 1994).

benefits at issue.[19] ("Because of *[Eichel*'s] authority, we are constrained to hold it was prejudicial error to receive evidence of sums received by [plaintiff] from the Railroad Retirement Board." *Caughman*, 345 F.2d at 436.) Thus, only review of this issue by this Court can avoid continued misinterpretation of FELA by federal and state trial and appellate courts.[20]

B. The Premise Which Underlies *Eichel* Is Erroneous And Should Be Reexamined By This Court

Because it was never at issue in *Eichel*, the notion that RRA disability benefits may not be considered in mitigation of FELA damages has never been properly examined by this Court. This unexamined premise, however, undergirds the *Eichel* Court's statement that the prejudicial effect of evidence of receipt of RRA disability benefits outweighs its probative value: a statement which prohibited petitioner from introducing important evidence in the case below.

Commenting on *Eichel* defendant New York Central's decision not to argue that it could offset RRA disability benefits received by the plaintiff against FELA damages, this Court observed that such benefits are not attributable to the employer, citing to *N.Y., N.H. & H. R.R. v. Leary*, 204 F.2d

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[19] In *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998), the Court partially freed itself from the imaginary shackles of *Eichel*, affirming, as within the trial court's discretion, admission of Railroad Retirement disability payments to show the plaintiff's lack of motivation to return to work. Thus, as petitioner points out, there is a split in the circuits on this issue.

[20] This Court has granted *certiorari* to address claims that the lower courts misconceived the meaning of a prior Supreme Court decision. *See e.g.,Wilkinson v. United States*, 365 U.S. 399 (1961). This Court has granted *certiorari* in recent cases to assure that lower courts interpret FELA correctly. *E.g., Norfolk & Western Ry. v. Hiles*, 516 U.S. 400 (1996); *Consolidated Rail Corp v. Gottshall*, 512 U.S. 532 (1994).

461 (1st Cir.), *cert. denied,* 346 U.S. 856 (1953). Then, addressing the only issue in controversy, this Court opined that the likelihood of use (or rather, misuse) of such evidence by the jury for the prohibited purpose clearly outweighed its value, rendering it also inadmissible for the purpose of showing the plaintiff's lack of motivation to return to work.[21] This Court cited its decision in *Tipton v. Socony Mobile Oil Co.,* 375 U.S. 34 (1963) to support its concern over potential jury misuse of evidence of collateral benefits. In *Tipton* however, this Court noted that the trial judge had failed to frame a cautionary instruction for the jury on the proper use of the evidence, 375 U.S. at 35, calling into question the presumption made in numerous subsequent rulings by lower courts that the prejudicial impact of evidence of disability benefits *invariably* outweighs its probative value.

The authoritative character which lower courts give to this Court's remarks in *Eichel,* with respect to an issue never properly put before it, bears examination. A proper determination of whether and to what extent RRA disability benefits may be offset against a FELA award (or admitted for other purposes) requires a careful examination of the assumption that these benefits are "not attributable to the employer," a question never raised by the New York Central given its concession. In fact, the *Eichel* defendant's concession need not, and should not, be accepted as reflective of sound public policy, because disability benefits paid under the RRA are not a collateral source and admission of evidence of their receipt does not implicate the policies which underlie the common law rule against admission of collateral source payments to a plaintiff in a tort action. Viewed this

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[21] In doing so, it is important to note that this Court was simply affirming the trial court's exercise of its discretion to exclude the evidence, a ruling which had been reversed by the Second Circuit. Unfortunately, this point seems to have been lost on virtually all but the *McGrath* court.

way, the concern over improper use of the evidence by the jury is greatly diminished, and a *per se* rule of inadmissibility is entirely unwarranted. Consequently, trial courts should be free to exercise their discretion under Fed. R. Evid. 403 (or equivalent state evidentiary rules) about the value of the evidence in a particular FELA case.[22]

C. Because Funding of RRA Occupational Disability Benefits Is Primarily Attributable To Railroad Employers, The Collateral Source Rule Is Not Applicable To These Payments

The rationale behind the collateral source rule does not apply with respect to RRA occupational disability benefits. In *Green*, the court summarized the purpose and rationale for the collateral source rule:

> The collateral source rule allows a plaintiff to seek full recovery from a tortfeasor even though an independent source has compensated the plaintiff in full or in part for the loss. The rationale for the rule is at least two-fold: First, public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an *independent source* (emphasis supplied) *FDIC v. United Pac. Ins. Co.*, 20 F.3d 1070, 1083 (10th Cir. 1994). Second, by assuring a plaintiff's payments from a collateral source will not be reduced by a subsequent judgment, the rule encourages the maintenance of insurance. *Quinones v. Pennsylvania Gen. Ins. Co.*, 804 F.2d 1167, 1171 (10th Cir. 1986).

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[22] The trial court in *Green* did just that, admitting evidence of RRA disability benefit payments to avoid the unfairness of the railroad paying twice for the same injury. The Tenth Circuit reversed on the basis of *Eichel*.

59 F.3d at 1032.[23] "However, where the defendant has been the source of the payment, the damages, generally, cannot include the benefit conferred by the defendant." *Feeley v. United States*, 337 F.2d 924, 927 (3d Cir. 1964). Although "the collateral source rule . . . bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the tortfeasor," *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1243 (5th Cir. 1994), "[p]roperly interpreted [it] also prevents tortfeasors from paying twice for the same injury—a result that would achieve both overdeterrence and overcompensation." *Id.* at 1243, n.21. *See also Phillips v. Western Co. of N. Am.*, 953 F.2d 923, 931 (5th Cir. 1992).

It is clear that only where the plaintiff receives payment from a source independent from the defendant is it appropriate to permit a double recovery, and consequently to exclude evidence of the collateral payment. However, the premise that RRA occupational disability benefits are independent of the railroad employer does not withstand scrutiny of the program under which those benefits are administered. Occupational disability benefits are part of the Railroad Retirement System, *see supra* pp. 3-4, and while they are administered and paid by a government agency, they are largely funded by railroad employers. Like all Railroad Retirement benefits that are over and above those available to Social Security recipients, occupational disability benefits are financed by Tier II payroll taxes, of which railroad employers pay the lion's share. The Tier II payroll tax is equal to 21 percent of each employee's earnings (up to a threshold amount: $56,700 in 2000), with 16.1 percent being paid by the employer, 26 U.S.C. § 3221(b), and the remaining 4.9 per cent paid by the employee. 26 U.S.C. § 3201(b). Thus, about

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[23] *See also Kassman v. American Univ.*, 546 F.2d 1029, 1034 (D.C. Cir. 1976); 22 AM. JUR. 2d *Damages* § 566 (1988).

three-quarters of the funding for the benefit received by respondent and numerous other FELA plaintiffs is attributable to payments made by railroad employers. In fiscal year 1999, this payment amounted to about $1.9 billion.[24]

Because occupational disability benefits received under the RRA are not independent of, but rather are funded through substantial contributions made by, the employer, the primary rationale for the collateral source rule is not applicable. Moreover, because RRA disability benefit payments are not the result of individual decisions to procure insurance against disability, there is no concern that permitting an offset will reduce a railroad employee's motivation to maintain insurance. It is difficult, therefore, to see why introducing factual information about disability benefits received through a federally mandated program would prejudice FELA plaintiffs, unless it is their contention that it is prejudicial to present facts that would cause juries to avoid awarding damages for non-existent wage losses.[25]

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[24] RRB Annual Report at 9. Total Tier II payroll taxes payment was about $2.5 billion, thus the employer's share was 76.6 percent of that amount, or about $1.9 billion. The statement in *Leary*, cited in *Eichel*, to the effect that benefits received under the Railroad Retirement Act are not directly attributable to the contributions of the employer, is therefore inaccurate. While the money paid by a specific employer is not earmarked for a particular employee's benefits, money is fungible and, through their payment of billions of dollars in Tier II taxes over the years, railroads contribute substantial amounts to fund the payment of disability benefits to employees injured at work.

[25] To the extent there is concern that evidence of receipt of disability benefits might bias a jury against a finding of liability notwithstanding railroad negligence, a proper limiting instruction can be given by the trial court. *See Tipton*. Moreover, disallowing introduction of RRA disability benefits may well bias juries in the other direction. The incorrect assumption that an injured plaintiff has no source of income might lead to a finding of liability even if the jury did not believe the railroad had been negligent.

D. In Non FELA Cases Courts Routinely Allow Offsets Where The Defendant Is The Source Of Another Benefit Received By The Plaintiff

Outside the context of FELA, where they have not felt constrained by *Eichel*, courts have undertaken a more flexible analysis with regard to the admissibility of evidence of collateral benefits. Where plaintiffs have sued for and received damages for disabilities or other harm suffered, while simultaneously being eligible for additional compensation for the same loss, courts have been willing to sanction offsets to prevent double recoveries.

In a case brought against the government under the Federal Tort Claims Act (FTCA), the government contended that the damage award should have been offset by a monthly disability payment, also paid by the government, which the plaintiff was receiving. While there was some confusion over the statutory basis for the disability payments, the court ordered a deduction from the award, holding that

> [w]hatever the nomenclature, the payments to plaintiff were essentially compensation for her disability. And to compensate her in full by lump-sum judgment under the Tort Claims Act for her total and permanent disability, and in addition compensate her by monthly payments for her disability, would constitute double payment *pro tanto* for such disability.

United States v. Gray, 199 F.2d 239, 244 (10th Cir. 1952). Consistent with this principle, in *EEOC v. Wyoming Retirement System,* 771 F.2d 1425 (10th Cir. 1985), the court upheld the deduction of Social Security payments from a backpay award made under the Age Discrimination in Employment Act. In exercising its discretion, the trial court had found that the claimants "would still be made whole even

though their damage awards were reduced to the extent of the Social Security payments." 771 F.2d at 1431.[26]

Even where the extent of the defendant's contribution toward the collateral payment is not entirely clear, courts have indicated that an effort should be made to credit the defendant to the extent it has paid twice for the same harm. In a suit brought under the FTCA, the plaintiff challenged the trial court's deduction of Social Security benefits from the award. *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977). The court noted that to the extent the payments were based on contributions by the plaintiff and his employer they were collateral to the defendant. However, noting that "the government has supplemented the fund from time to time . . . some effort to ascertain the percentage or part contributed by the government should be made so as to permit a determination of the contribution of the employer and employee and their exclusion as collateral sources." 549 F.2d at 1379.

The notion that plaintiffs in tort cases should have the benefit of duplicative payments received from governmental or other sources has been expressly rejected by a number of states in favor of a policy which allows plaintiffs to be made whole, while avoiding a double recovery. *See Parker v. Esposito*, 677 A.2d 1159 (N.J. 1996)(Requiring offset of Social Security payments in negligence action pursuant to

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[26] In *Eichel*, this court suggested that RRA disability benefits should not be offset because they are akin to Social Security benefits, 375 U.S. at 254. However, it is clear that courts see no bar to offsetting payments made under the Social Security Act against damages awards. *See e.g., Flowers v. Komatsu Mining Systems, Inc.*, 165 F.3d 554 (7th Cir. 1999)("It is within the district court's discretion to set off–or not to set off–Social Security disability payments" against an award under the Americans With Disabilities Act. 165 F.3d at 558.); *Hassan v. United States Postal Service*, 842 F.2d 260 (11th Cir. 1988)(Not error to deduct Social Security benefits from FTCA award per Florida law.)

New Jersey law.); *Haberkorn v. Chrysler Corp.*, 533 N.W.2d 373 (Mich. App. 1995) (Requiring offset of Social Security payments in product liability action pursuant to Michigan law.) *Frey v. Smith*, 751 F.Supp. 1052 (N.D.N.Y. 1990) (Requiring offset of Social Security payments in wrongful death action pursuant to New York law.)

II. Introducing Evidence of A Railroad Employee's Receipt of Railroad Retirement Disability Benefits is Consistent With the Purposes of FELA

There is no justification for deviating from the principles of compensation recognized by numerous courts and state legislatures simply to maintain a special, expansive collateral source rule for the benefit of FELA plaintiffs.[27] Like the plaintiff in this case, numerous railroad employees who have received awards under FELA also collect monthly RRA disability payments. Although Congress has chosen to confer on railroad employees unique and favored treatment under both FELA and the Railroad Retirement system—and only Congress can change that status—no law or public policy requires either that (1) a railroad employee be compensated twice for the same injury, or (2) railroad employers pay twice for that injury.

Even if a FELA jury takes into account receipt of RRA disability benefits, at worst the plaintiff-employee would still receive his or her full wage loss through a combination of the disability benefits received and the damages award for lost earnings from the defendant (and would also be entitled to

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[27] Some Courts have read *Eichel* as requiring a special rule for FELA cases. *See e.g., Sheehy* ("[T]he discretion [under FRE 403] normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases." 631 F.2d at 652.); *Page supra* ("Both *Tipton* and *Eichel* reflect a strong public policy against the use of such collateral source evidence in FELA and analogous Jones Act-maritime law seamen's cases." 349 F.2d at 822.)

any noneconomic damages proven). So long as the employee receives the equivalent of his full wage loss, he or she is being made whole, which, of course, is the purpose of FELA. *Michigan Central R.R. v. Vreeland*, 227 U.S. 59, 70 (1913).

The FELA does not contemplate that the plaintiff receive any more than the full actual loss suffered as a consequence of the injury. In *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), this Court held that a trial court may not preclude a railroad from introducing evidence of the income taxes payable on the plaintiff's past and future wages. Such evidence would tend to decrease the amount of damages for which the railroad would be liable to the injured employee (from gross pay to net pay). Nonetheless, even though it may serve to reduce the defendant's liability, such evidence is appropriate because the goal of FELA is to replace only what the injured party has lost. *Id.* at 496, n.10. Reexamination of *Eichel* would be consistent with the principles announced in *Leipelt*.[28]

Other recent decisions by this Court demonstrate that nothing requires that FELA be interpreted to enhance the likelihood, or inflate the amount, of recovery by the employee when such an interpretation is not supported by the words of the statute or the principles that govern ordinary negligence cases.[29] Though in enacting FELA Congress took specific

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[28] Just as an expert can testify on the likely effect of taxes on an employee's future wages, 444 U.S. at 494, testimony could be elicited on the portion of an RRA benefit attributable to the employers' contribution, allowing a jury to make a proper offset.

[29] In *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330 (1988), this Court declined to find that prejudgment interest was available under FELA, reasoning that Congress had not explicitly provided for it and that it generally was not recognized at common law when FELA was enacted. This Court also refused to expand the common law zone-of-danger test for adjudicating FELA claims alleging intentional infliction of emotional distress. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997).

affirmative steps to lower the then-existing common law barriers to recovery,[30] where Congress did not specifically alter the common law, FELA jurisprudence is to be guided by generally applicable common law principles. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994). Thus, there is no basis for assuming that the collateral source rule acquires any special application in the context of FELA, or that it be applied to facilitate a double recovery for railroad employees even when to do so would not effectuate FELA's purpose.

Reviewing this case will allow this Court carefully to consider the important policy issues raised by the question of whether and when it is appropriate to introduce evidence of a FELA plaintiff's receipt of RRA disability benefits, an analysis which heretofore has not been undertaken. To leave the ruling below undisturbed would permit rail employees to continue to receive both the full amount of disability benefits for which they qualify and to seek compensation for full wage loss under FELA, with the juries hearing their claims unaware of the double recovery and unable to consider the impact it might have on the plaintiff's motivation to return to work, let alone the financial consequences of the undisclosed double recovery. A matter which so fundamentally affects the rights of FELA litigants deserves careful review by this Court.

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[30] *See* 45 U.S.C. § 53, eliminating the defense of contributory negligence in favor of comparative negligence, and 45 U.S.C. § 54, eliminating the assumption of the risk defense.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Missouri Supreme Court in this case be granted.

Respectfully submitted,

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